No. 96-1469-CFY  Title: United States, Petitioner
v.
Hernan Ramirez

Docketed: March 17, 1997  Court: United States Court of Appeals for the Ninth Circuit

| Entry | Date | Proceedings and Orders |
|---|---|---|
| | Jan 30 1997 | Application (A96-547) to extend the time to file a petition for a writ of certiorari from February 13, 1997 to March 15, 1997, submitted to Justice O'Connor. |
| | Feb 4 1997 | Application (A96-547) granted by Justice O'Connor extending the time to file until March 15, 1997. |
| | Mar 17 1997 | Petition for writ of certiorari filed. (Response due May 16, 1997) |
| | Apr 7 1997 | Order extending time to file response to petition until May 16, 1997. |
| | May 16 1997 | Brief of respondent Hernan Ramirez in opposition filed. |
| | May 16 1997 | Motion of respondent for leave to proceed in forma pauperis filed. |
| | May 16 1997 | Appendix of respondent filed. |
| | May 27 1997 | DISTRIBUTED. June 12, 1997 |
| | May 28 1997 | Reply brief of petitioner United States filed. |
| | Jun 16 1997 | REDISTRIBUTED. June 19, 1997 |
| | Jun 23 1997 | Petition GRANTED.<br>SET FOR ARGUMENT January 13, 1998.<br>********** |
| | Jun 23 1997 | Motion of respondent for leave to proceed in forma pauperis GRANTED. |
| | Jul 31 1997 | Order extending time to file brief of petitioner on the merits until September 8, 1997. |
| | Aug 4 1997 | Brief amici curiae of Americans for Effective Law Enforcement, Inc., et al. filed. |
| | Aug 27 1997 | Motion of the Acting Solicitor General to dispense with printing the joint appendix filed. |
| | Sep 2 1997 | Brief of petitioner United States filed. |
| | Sep 8 1997 | Brief amici curiae of Ohio, et al. filed. |
| | Sep 22 1997 | Order extending time to file brief of respondent on the merits until November 5, 1997. |
| | Sep 29 1997 | Motion of the Acting Solicitor General to dispense with printing the joint appendix GRANTED. |
| | Nov 3 1997 | Brief amicus curiae of National Association of Criminal Defense Lawyers filed. |
| | Nov 5 1997 | Brief of respondent Hernan Ramirez filed. |
| | Nov 17 1997 | Record filed. |
| | Nov 24 1997 | Record filed. |
| | Dec 4 1997 | CIRCULATED. |
| | Dec 10 1997 | Reply brief of petitioner United States filed. |
| | Jan 13 1998 | ARGUED. |

Supreme Court, U.S.
FILED

961469 MAR 17 1997

No. OFFICE OF THE CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES OF AMERICA, PETITIONER

*v.*

HERNAN RAMIREZ

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## PETITION FOR A WRIT OF CERTIORARI

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75 pp

## QUESTION PRESENTED

Whether police officers must possess more specific evidence of danger to themselves or others in order to justify a no-knock entry in which they damage a door or window than would be required to justify a no-knock entry made without damage to property.

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# In the Supreme Court of the United States

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HERNAN RAMIREZ

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## PETITION FOR A WRIT OF CERTIORARI

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The Acting Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

### OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-27a) is reported at 91 F.3d 1297. The opinion of the district court (App., *infra*, 28a-36a) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on August 2, 1996. A petition for rehearing was denied on November 15, 1996 (App., *infra*, 48a). On February 4, 1997, Justice O'Connor extended the time for filing a petition until March 15, 1997 (a Saturday). The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 3109 of Title 18 of the United States Code provides:

> **Breaking doors or windows for entry or exit**
>
> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

## STATEMENT

A grand jury in the District of Oregon returned an indictment charging respondent with possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g)(1). Respondent moved to suppress evidence obtained during a search of his residence, including the two firearms that formed the basis for the offense charged in the indictment. The district court granted



the motion. App., *infra*, 28a-36a. The court of appeals affirmed. *Id.* at 1a-27a.

1. On November 2, 1994, while en route to testify at a state criminal trial, federal inmate Alan Lawrence Shelby slipped out of his handcuffs, assaulted a deputy sheriff, and escaped from custody. At the time, Shelby was serving concurrent sentences for federal drug and firearms violations, and for a state armed robbery conviction. App., *infra*, 2a, 32a-33a. On November 4, 1994, Deputy U.S. Marshal Wayne Kauffmann applied for a warrant to search respondent's residence in Boring, Oregon, for Shelby. *Id.* at 41a. The affidavit in support of the warrant application recounted that a reliable confidential informant had seen a person believed to be Shelby at respondent's residence. The person had been introduced to the informant as "Alan," and had stated in the informant's presence, "I had to knock out a guard." *Id.* at 39a. According to the affidavit, after receiving that information, the informant and an agent with the Bureau of Alcohol, Tobacco, and Firearms had driven past respondent's residence and seen a man "who they believed to be Alan Shelby outside the residence." *Id.* at 39a-40a. Deputy Marshal Kauffmann's affidavit further stated that he had then driven to respondent's residence and seen someone who, Kauffmann believed, was the same person seen by the ATF agent. *Id.* at 40a.

The affidavit also described the basis for Deputy Marshal Kauffmann's belief that "Shelby is an extreme danger to law enforcement officers." App., *infra*, 41a. In particular, it stated that Shelby had previously been convicted of conspiracy to manufacture methamphetamine, possession of methamphetamine with intent to distribute it, and using or

carrying a firearm during and in relation to a drug trafficking offense; that Shelby "had a history of violent escapes"; and that Shelby had stated that he would not "do federal time." *Id.* at 38a.

According to the affidavit, in 1991 Shelby had attempted to escape from custody "by striking a corrections officer in the face and kicking out the door of the jail. Shelby ran from the jail and assaulted a woman in a parking lot and stole her vehicle. During the escape attempt, Shelby rammed a police vehicle with the stolen vehicle." App., *infra*, 38a. The affidavit further stated that Shelby "has made threats to kill witnesses and police officers associated with his incarceration" and that he "has brutally tortured others in the past with a hammer." *Id.* at 38a-39a. Finally, the affidavit stated that Shelby "has had access to large caches of weapons." *Id.* at 39a. See also *id.* at 33a.

Based on the information in the affidavit, a magistrate judge issued a warrant to search respondent's residence for Shelby. The warrant expressly provided that, "because of exigent circumstances shown in the application, you are authorized to enter the premises without complying with the Knock-and-Announce requirement." C.A. E.R. 27.

Before they executed the warrant, officers learned from the informant that respondent Ramirez "was possibly involved in drugs, which he kept in the garage," and that "there were supposed to be several guns in [respondent's] garage." App., *infra*, 3a, 33a, 43a-44a. On November 5, 1994, at about 6:15 a.m., approximately 45 law enforcement officers surrounded respondent's house. Using a loudspeaker, a police officer announced the officers' presence and ordered the occupants of the dwelling to come out. At the



same time, a police officer broke open the window of the garage attached to the house, while another officer shouted "Sheriff's Office, Search Warrant." *Id.* at 3a-4a, 29a, 44a.

Awakened by the police activity, respondent initially thought that his house was being burglarized. He ran to a closet, obtained a gun, and fired it into the ceiling. A short time later, respondent realized that the police had surrounded the house, and he surrendered. After receiving and waiving his *Miranda* rights, respondent admitted that he was a convicted felon and that he owned the gun that he had fired, as well as another firearm. Respondent further admitted that a man resembling Shelby had been at his house two days earlier. Based on respondent's statement, and the officers' observation of the gun respondent had fired, the officers obtained a second search warrant and seized the two firearms. App., *infra*, 4a, 29a, 45a-46a.

2. Respondent was charged with possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g)(1). He moved to suppress the firearms seized from his house, and the district court granted the motion. App., *infra*, 28a-36a. The court found that the warrant to search respondent's house for Shelby was supported by probable cause. *Id.* at 30a-31a. It concluded, however, that the officers had violated the federal knock-and-announce statute, 18 U.S.C. 3109, and the Fourth Amendment because their reasons for making an unannounced entry were insufficient to justify breaking the window of Ramirez's garage as they announced their presence. App., *infra*, 31a-35a.

The court stated that, under Ninth Circuit precedent, "mild exigency, such as knowledge that a person is dangerous, can justify an immediate entry that is

done without physical destruction of property," but an "entry that is accomplished by physical destruction of property [requires] more specific inferences of exigency." App., *infra*, 32a (citing *United States* v. *Becker*, 23 F.3d 1537, 1540-1541 (9th Cir. 1994)). The court acknowledged that "there were specific facts known regarding Shelby's propensity to attempt escape, his disdain for federal incarceration, and his past willingness to use threats and violence as a means of intimidation." *Id.* at 34a. Those facts, the court concluded, presented "sufficient exigent circumstances to have allowed immediate entry into [respondent's] residence where entry could be obtained without physical destruction of property." *Id.* at 33a.

The court held, however, that the government had not demonstrated sufficient exigency to justify breaking respondent's window during the search because "there was no information that [Shelby] was armed and dangerous at [respondent's] home, or that he would present any specific dangers to arresting officers if found there." App., *infra*, 34a. In the court's view, the officers' decision to break a garage window in the course of serving the warrant, "although prompted by a knowledge of Shelby's past, was not sufficiently supported by circumstances suggesting that the fugitive posed a particular danger to others during this attempted apprehension." *Id.* at 34a-35a. Because it concluded that the bases for the second search warrant, and the subsequent seizure of respondent's firearms, were "direct consequences of the manner in which the first warrant was executed," the court ordered that the weapons be suppressed. *Id.* at 35a.

3. A divided panel of the court of appeals affirmed. App., *infra*, 1a-27a. The majority stated that "exigent



circumstances can justify breaking into a house without notice." *Id.* at 8a. It further stated, however, that, "[w]hen exigency is claimed, we must determine what kind of exigency it was." *Ibid.*

Like the district court, the majority employed the two-tiered analysis required by circuit precedent. It explained that, while "even a mild exigency, like knowledge that a person is dangerous, can justify immediate entry where that can be done without any physical disruption of property," App., *infra*, 8a (quoting *Becker*, 23 F.3d at 1540), "[m]ore specific inferences of exigency are necessary" where the destruction of property is involved, *ibid.* (quoting *Becker*, 23 F.3d at 1541).

Applying that test, the majority held that a sufficient level of exigency had not been shown here:

> The 45 officers did not fear any of the actual residents of the house and were not attacking a gang or cult hangout where they might be met by a fusillade of gunfire. They were concerned about one person, Shelby, who might be on the premises. But Shelby was not known to have ever shot or shot at anyone. He was an escape artist, who said he would not go to federal prison. He had knocked people down in his escape attempts, and he had stolen a car and run into a police vehicle. His violence towards law enforcement had not extended beyond that, even though he had obviously been arrested on some occasions. Perhaps his degree of dangerousness bespoke a mild exigency. Certainly it did not bespeak more.

App., *infra*, 9a. Because it found that the government had failed to adduce "specific evidence that Shelby was armed, that he would use firearms against the

officers, or that when he was faced with [a] show of force he would do anything violent at all," *id.* at 11a-12a, the court concluded that respondent's "statutory and Fourth Amendment rights were violated when government agents broke into his home in the early morning hours without complying with the knock-and-announce requirements," *id.* at 17a.[1]

Judge Kozinski dissented. App., *infra*, 18a-27a. He argued that "[t]he record contradicts the majority's romantic description of Shelby," who was, in Judge Kozinski's view, "a hardened and desperate criminal." *Id.* at 18a. Judge Kozinski emphasized that the officers knew that Shelby had "a history of violent escapes," had "[a]ssault[ed] helpless civilians" and law enforcement officers in effecting those escapes, and had engaged in "brutal[] tortur[e]." *Id.* at 19a-20a. The dissent further observed that officers had specific information about Shelby's access to firearms. *Id.* at 20a. Based on those facts, the dissent argued that the officers had "properly balanced the homeowner's privacy and property interests against the dictates of security." *Id.* at 23a-24a (citing *Wilson* v. *Arkansas*, 115 S. Ct. 1914, 1918 (1995)).[2]

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[1] The majority further concluded that the "seizure of the guns * * * came as the most direct, if not the only, result of the" police "break-in," and that "suppression would serve to dissuade the police from this kind of unnecessary invasion of people's homes." App., *infra*, 13a.

[2] Judge Kozinski also dissented on the ground that, "[e]ven had the no-knock search been illegal, this would provide no grounds for suppression of the evidence pertaining to [respondent]." App., *infra*, 24a.



## REASONS FOR GRANTING THE PETITION

The court of appeals did not doubt that the officers who executed the search warrant in this case reasonably believed that providing advance notice of their presence and purpose would have increased the risk of danger they faced in seeking to apprehend an escaped fugitive who had a history of violent acts. In concluding that the immediate entry to execute the warrant was illegal, however, the court of appeals employed a two-tiered analysis focusing on property damage. Under the court's test, when officers break property to effect a no-knock entry, that action significantly elevates the showing of potential harm required to justify the entry. Applying that test here, even the minor damage to property involved in this case (breaking a garage window) imposed on the officers the need to have "[m]ore specific inferences of exigency" (App., *infra*, 8a) than the evidence that the officers had: that a person sought within the house was an escaped fugitive with a prior history of violence.

The Ninth Circuit's two-tiered approach to no-knock entries is incorrect, because it erroneously makes property damage the determinant of how specifically officers must be able to infer a risk of danger before they may make a no-knock entry. The question whether officers may make an unannounced, no-knock entry should turn instead on whether the officers reasonably believe that giving prior notice of their presence and purpose, and providing a grace period for occupants to open the door, would expose the officers to a risk of danger, would facilitate a fugitive's escape, or would likely prompt the destruction of evidence. The Ninth Circuit's bifurcated

approach is also unique. In no other circuit would the government face an increased burden to justify a no-knock entry simply because property damage occurred in the course of the entry. Because the Ninth Circuit's approach is wrong, conflicts with the approach employed in other circuits, and threatens to jeopardize the safety of law enforcement officers in the dangerous task of executing warrants, review by this Court is warranted.

1. a. In *Wilson* v. *Arkansas*, 115 S. Ct. 1914 (1995), this Court held that the common-law knock-and-announce principle is "an element of the reasonableness inquiry under the Fourth Amendment," such that "in some circumstances an officer's unannounced entry into a home might be unreasonable under the Fourth Amendment." *Id.* at 1918. One of the interests that underlie the knock-and-announce principle is the avoidance of damage to property. See *id.* at 1918-1919; *United States* v. *Kemp*, 12 F.3d 1140, 1142 (D.C. Cir. 1994); 2 Wayne R. LaFave, *Search and Seizure* § 4.8(a), at 599 (3d ed. 1996). But the more fundamental interest protected by the announcement principle is the avoidance of unnecessary surprise to the occupants of a dwelling that is about to undergo a warrant-authorized search. As the Court held in *Sabbath* v. *United States*, 391 U.S. 585 (1968), the use of "force" in effecting an unannounced entry is not necessary to trigger the federal knock-and-announce provision, 18 U.S.C. 3109. Although Section 3109 uses the phrase "break open," the Court explained that "[a]n unannounced intrusion into a dwelling—what § 3109 basically proscribes—is no less an unannounced intrusion whether officers break down a door, force open a chain lock on a partially open door, open a locked door by use of a passkey, or * * * open



a closed but unlocked door." 391 U.S. at 590; see also *ibid.* ("The protection afforded by, and the values inherent in, § 3109 must be governed by something more than the fortuitous circumstance of an unlocked door.") (internal quotation marks omitted).[3]

While recognizing the knock-and-announce principle, the Court in *Wilson* also emphasized that the Fourth Amendment's "flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests." 115 S. Ct. at 1918. Without delineating "a comprehensive catalog" of the factors that could overcome the "presumption in favor of announcement," *id.* at 1918-1919, the Court noted, by way of example, that an unannounced entry may be justified "under circumstances presenting a threat of physical violence," *ibid.*, "where police officers have reason to believe that evidence would likely be destroyed if advance notice were given," *id.* at 1919, and "where a prisoner escapes * * * and retreats to his dwelling." *Ibid.* (citing *Read* v. *Case*, 4 Conn. 166, 170 (1822) (plaintiff who "had resolved * * * to resist even to the shedding of blood * * * was not within the reason and spirit of the rule requiring notice")).

b. The court of appeals in this case applied its long-standing rule that, when officers enter to execute a warrant without a prior announcement, the specificity of their knowledge of the potential dangers

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[3] Although *Sabbath* involved Section 3109, both that provision and the Fourth Amendment incorporate the common-law announcement principle—and the acknowledged grounds for dispensing with a prior announcement. See *Wilson*, 115 S. Ct. at 1918 n.3 (noting that in *Sabbath*, 391 U.S. at 591 n.8, the Court suggested that both the "'common law' rule of announcement and entry and its 'exceptions' were codified in § 3109").

resulting from a prior announcement must be greater if the unannounced entry entails even minor "physical disruption of property." App., *infra*, 8a (quoting *United States* v. *Becker*, 23 F.3d 1537, 1540 (9th Cir. 1994)). See also *United States* v. *McConney*, 728 F.2d 1195, 1206 (9th Cir.) (en banc), cert. denied, 469 U.S. 824 (1984). Under that approach, where property damage occurs during a no-knock entry to execute a warrant, officers must demonstrate "[m]ore specific inferences of exigency" (App., *infra*, 8a) than the serious risk of harm to officers and others that existed in this case.

The Ninth Circuit's approach is incorrect. As the Court recognized in *Wilson*, an unannounced, no-knock entry may be justified by the valid law enforcement interests that exist when officers reasonably believe that advance notice might increase the risk of harm to officers or frustrate the purpose of the search. 115 S. Ct. at 1918-1919. The need to damage property in making an unannounced entry has no bearing on whether those law enforcement interests are present. When the requisite peril to officers exists, or there are other risks that make it reasonable for officers to employ the element of surprise, it should not matter whether the fortuity of an unlocked door or open window enables officers to execute an unannounced entry without breaking property, or, as is more common, the physical characteristics of the doors and windows make it necessary for officers to break property to enter. Cf. *Dalia* v. *United States*, 441 U.S. 238, 257 n.19 (1979) ("[O]ften it is impossible to anticipate when [it] will be necessary" for officers to engage in "forceful breaking and entering * * * to effect a warranted search."). In either situation, the justification for the immediate entry is the need for



surprise; that need does not diminish simply because minor property damage may be necessary.

Indeed, the breaking of a window may be a means to distract the occupants and thereby greatly increase the officers' ability to gain quick control of the situation. By drawing the occupants' attention to the sound of breaking glass, officers may be able to divert the occupants into less threatening positions and thereby reduce the risk of violence. Cf. *Michigan* v. *Summers*, 452 U.S. 692, 702-703 (1981) ("The risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation."). Thus, the question whether an unannounced entry is justified should turn on whether law enforcement interests would be jeopardized by giving advance warning, not on whether property is damaged during the entry. And where "knowledge that a person is dangerous" (App., *infra*, 8a) would justify unannounced entry through an open door or window, no greater or more specific showing should be required merely because a locked door or window makes a degree of property damage necessary to safe execution of the warrant.

That is not to say that destruction of property has no place in analyzing the reasonableness of the entry. Excessive or wholly unnecessary destruction of property by law enforcement officers in the execution of a warrant may violate the Fourth Amendment's reasonableness standard, whether or not officers knock and announce before entry. See 2 LaFave, *Search and Seizure* § 4.10(d), at 673-674 (describing "the long-standing requirement[] that the officers * * * avoid *unnecessary* damage to the premises") (emphasis added); *Kemp*, 12 F.3d at 1142 (interests advanced by statutory knock-and-announce requirement include

"preventing *needless* destruction of private property") (emphasis added); *Buckley* v. *Beaulieu*, 104 Me. 56, 61 (1908) (where officers unnecessarily destroyed walls of suspect's home, "the manner and extent of the search in this case were unreasonable and in excess of the officers' authority"); cf. *Maryland* v. *Garrison*, 480 U.S. 79, 84 (1987) (examining "reasonableness of the manner in which [a search warrant] was executed"). Thus, even when an unannounced entry is justified to protect the officers' safety or to foil an escape, the no-knock entry must still be carried out in a reasonable manner, involving a proportionate amount of force. Just as officers may not use excessive force in making an otherwise valid probable-cause arrest, see *Graham* v. *Connor*, 490 U.S. 386, 396-397 (1989), they may not destroy property unnecessarily in making an otherwise-valid unannounced entry.

In contrast to that approach, the test employed by the court of appeals makes property damage relevant to whether an unannounced entry is justified at all. Under the Ninth Circuit's two-tiered inquiry, the breaking of *any* property automatically increases the burden on the officers to possess "more specific inferences" of danger or other harms that warrant an unannounced entry. The court of appeals has suggested that such inferences would include proof that "evidence was being destroyed," *United States* v. *Whitney*, 633 F.2d 902, 910 (1980), cert. denied, 450 U.S. 1004 (1981), or "specific information that [a dwelling's resident] was armed or dangerous," *Becker*, 23 F.3d at 1541. Because such specific inferences are ordinarily unavailable to officers, the court of appeals' rule would require officers to forgo unannounced entries to execute search warrants, even where the available



facts strongly support the use of surprise to reduce risks to officers or secure the objects of the search.[4]

The degree of certainty expected by the court of appeals not only is unrealistic, but is inconsistent with the degree of deference that this Court affords police officers' contemporaneous assessment of the risk of violence they face. The Court has frequently noted the "weighty interest in officer safety," *Maryland* v. *Wilson*, No. 95-1268 (Feb. 19, 1997), slip op. 4, and, in recognition of that interest, has never required absolute assurance that a particular situation would threaten officers' safety in order to justify a measured intrusion on Fourth Amendment interests. See, *e.g.*, *Maryland* v. *Buie*, 494 U.S. 325, 336 (1990) ("protective sweep" of house justifiable based on "reasonable suspicion of danger"); *Michigan* v. *Long*, 463 U.S. 1032, 1049 (1983) ("protection of police and others can justify protective searches when police have a reasonable belief that the suspect poses a danger"); *Michigan* v. *Summers*, 452 U.S. at 702-703 ("interest in minimizing the risk of harm to the officers" justifies detaining occupant of premises while search is conducted); *Pennsylvania* v. *Mimms*, 434 U.S. 106, 110 (1977) (per curiam) (relying on "inordinate risk confronting an officer" to justify requirement that

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[4] The burdens placed on law enforcement officers by the "specific inferences" test are well demonstrated by this case. Here, although the escaped-fugitive Shelby had previously struck a corrections officer in the face to effect an escape, had stolen a car and rammed it into a law enforcement vehicle, had threatened to kill witnesses, had tortured another person with a hammer, had vowed not to serve federal time, and had access to weapons, the court of appeals surmised that "[p]erhaps" Shelby's "degree of dangerousness bespoke a mild exigency. Certainly it did not bespeak more." App., *infra*, 9a.

driver exit car in a traffic stop); *Chimel* v. *California*, 395 U.S. 752, 763 (1969) (search incident to arrest justified on ground that, without search, "officer's safety might well be endangered"). The "specific inferences" required by the court of appeals would expose officers to heightened risks in the particularly dangerous setting of warrant execution, contrary to the consistent view of this Court that "[c]ertainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties." *Terry* v. *Ohio*, 392 U.S. 1, 23 (1968).

c. Under a proper analysis, the entry in this case complied with the Fourth Amendment and Section 3109. The warrant to search respondent's property was based on probable cause to believe that Shelby was hiding there. App., *infra*, 30a-31a.[5] In addition, the officers executing the warrant had reliable information that (1) Shelby had been convicted of a number of felonies, including using or carrying a firearm during and in relation to a drug trafficking offense; (2) Shelby "had a history of violent escapes," and had stated that he would not "do federal time"; (3) Shelby had attacked officers and innocent bystanders in past escape attempts; (4) Shelby "ha[d] made threats to kill witnesses and police officers associated with his incarceration"; (5) Shelby "has had access to large caches of weapons"; (6) respondent Ramirez "was possibly involved in drugs, which he kept in the garage"; and (7) "there were supposed to be several guns in [respondent's] garage." *Id.* at 32a-33a, 38a-

[5] The court of appeals expressed some doubt about that proposition, but it decided this case on the assumption that probable cause was established. App., *infra*, 12a n.1.



39a, 43a-44a. Based on that knowledge, the officers had ample reason to conclude that a risk of violence would arise if they announced their presence before entry, and that making an unannounced entry would significantly reduce that risk. The officers were therefore justified in making a no-knock entry, whether or not the manner of entry required some damage to property.[6]

Not only was the unannounced entry justified, but the damage to respondent's property was neither gratuitous nor excessive. Rather, the minimal step of breaking the window to respondent's garage simultaneously with announcement and entry was a reasonable way both to obtain entry and to draw the occupants to a position away from the doors, and thereby facilitate the officers' ability to control the search scene. Accordingly, the manner of entry in this case was lawful.[7]

[6] The fact that the officers did not find Shelby does not undercut the reasonableness of their actions at the time. "It goes without saying that in determining the lawfulness of entry * * * we may concern ourselves only with what the officers had reason to believe *at the time of their entry*." *Ker* v. *California*, 374 U.S. 23, 40 n.12 (1963) (plurality opinion); cf. *Illinois* v. *Rodriguez*, 497 U.S. 177, 186 (1990).

[7] Even if the Court were to disagree with the above analysis, which considers, first, whether law enforcement interests justified dispensing with an announcement before entry and, second, whether any breakage of property during the entry was excessive under the circumstances, the Court should still reject the Ninth Circuit's two-tiered approach. At most, property damage should be one factor in considering the overall reasonableness of an unannounced entry. It should not function as a switch that greatly elevates the justifications needed to dispense with a prior announcement. Cf. *Illinois* v. *Gates*, 462 U.S. 213, 238 (1983). Under such an analysis, the minor

2. No other court of appeals employs the Ninth Circuit's two-tiered approach or requires a heightened showing of justification for unannounced searches that involve damage to property. Rather, other courts of appeals have inquired whether an immediate entry was justified by the circumstances, without adverting to officers' need to cause property damage. In applying that analysis, other courts of appeals have upheld forcible, unannounced entries based on equal or lesser showings of justification than existed here.[8]

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amount of property damage in this case would not be a basis for finding the unannounced entry to be unlawful.

[8] Most federal courts of appeals have stated that "exigent circumstances" may justify dispensing with a prior announcement under either the Fourth Amendment or Section 3109. The reference to "exigent circumstances," however, can cause confusion. "Exigent circumstances" is the phrase used to describe the justification needed to dispense with a warrant altogether before entering a dwelling. See *Payton* v. *New York*, 445 U.S. 573, 585-586 (1980); *Vale* v. *Louisiana*, 399 U.S. 30, 34-35 (1970). In the context of an unannounced entry, by contrast, the officers have ordinarily obtained a warrant. Thus, a magistrate has already authorized the intrusion into the residence, and, as *Wilson* makes clear, the question is only whether it would be "reasonable" within the meaning of the Fourth Amendment to enter without a knock and prior announcement. See *Ybarra* v. *Illinois*, 444 U.S. 85, 104 (1979) (Rehnquist, J., dissenting) ("[I]n judging the reasonableness of [a] search pursuant to [a] warrant, we need not measure it against jealously drawn exceptions to that requirement."). It stands to reason that an unannounced entry pursuant to a warrant may be "reasonable" under circumstances that would not justify a wholly warrantless entry into a dwelling. Indeed, in *Wilson*, this Court did not use the term "exigent circumstances" and stressed instead that an unannounced entry need only meet a "flexible" reasonableness standard that weighs the relevant



In *United States* v. *Lalor*, 996 F.2d 1578 (4th Cir.), cert. denied, 510 U.S. 983 (1993), for example, officers broke down the defendant's door with a battering ram while announcing their presence. *Id.* at 1580. The court upheld the search, despite its conclusion that "the evidence of the safety risk to the officers is not compelling." *Id.* at 1584. The particular evidence supporting that risk was that a weapon had been found on the defendant during an earlier arrest; that the defendant had earlier "[been] belligerent and made derogatory remarks about the police"; and "the general proposition that drugs and guns go together." *Ibid.* The court nowhere suggested that the damage to the defendant's property warranted "[m]ore specific inferences of exigency." App., *infra*, 8a (quoting *Becker*, 23 F.3d at 1541).

In *United States* v. *Kennedy*, 32 F.3d 876 (4th Cir. 1994), cert. denied, 115 S. Ct. 939 (1995), the court held that information available to officers executing a warrant—*i.e.*, that the defendant had a criminal record, was participating in a drug conspiracy, and probably had guns in his home, *id.* at 882-883—"amply justified" their failure to await a response before breaking down the defendant's door. *Id.* at 883. Again, there was no indication that damage to the defendant's property triggered a more stringent requirement of justification. Other cases are to the same effect. See *United States* v. *Dahlman*, 13 F.3d 1391, 1394 n.3, 1398 (10th Cir. 1993) (upholding no-knock search in which officers broke the window of a cabin and detonated an

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"law enforcement interests." 115 S. Ct. at 1918. See *Bodine* v. *Warwick*, 72 F.3d 393, 398 (3d Cir. 1995) (*Wilson* adopts an overall standard of reasonableness that considers exigency as a single factor).

explosive device to distract its inhabitants; failure to announce justified by defendant's statement that he intended to "shoot it out" with police rather than be arrested, defendant's attempt to disarm an officer during a prior arrest, officers' high-visibility approach, and barking guard dog), cert. denied, 511 U.S. 1045 (1994);[9] *United States* v. *Stowe*, 100 F.3d 494, 499 (7th Cir. 1996) (upholding no-knock search in which officers broke down defendant's door with steel battering ram, where police had knowledge that informant had seen defendant in house the night before with drugs and two loaded handguns, defendant had criminal record and alias, and residence had steel doors), petition for cert. pending, No. 96-7439 (filed Jan. 14, 1997); see also *United States* v. *Spinelli*, 848 F.2d 26, 29-30 (2d Cir. 1988).[10]

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[9] In *United States* v. *Stewart*, 867 F.2d 581 (10th Cir. 1989), the court of appeals stated that an "especially clear" showing was necessary to uphold an unannounced entry, in light of several factors, including the fact that "destruction of physical property took place." *Id.* at 584. More recently, however, the Tenth Circuit rejected the contention that its decision in *Stewart* requires a "specific showing" that "the defendant presents a danger to law enforcement officers in the context of resisting arrest with violence." *United States* v. *Maden*, 64 F.3d 1505, 1509 n.2 (1995).

[10] In determining whether exigent circumstances justify dispensing with a warrant altogether, the Second Circuit uses a multi-factor test that includes as one factor "the peaceful circumstances of the entry." See, *e.g.*, *United States* v. *Gordils*, 982 F.2d 64, 69 (1992), cert. denied, 507 U.S. 1054 (1993). Recently, the Second Circuit applied that test in determining whether officers had adequate grounds for making an unannounced entry pursuant to a warrant. See *United States* v. *Brown*, 52 F.3d 415, 421 (1995), cert. denied, 116 S. Ct. 754 (1996). In upholding the entry in that case, however, the court did not discuss the means of making the entry.



Thus, no other court of appeals focuses on property damage as the pivotal factor that elevates the specificity of proof required to justify an unannounced entry. And under the general approach employed in other circuits, the degree of danger that the officers reasonably believed that they faced in this case would have justified their decision to execute the search warrant for the escaped fugitive without giving prior notice to the occupants of respondent's house.

3. The court of appeals' approach is disruptive to law enforcement in the Ninth Circuit and increases the risk of harm faced by officers executing warrants. Executing search warrants is often highly dangerous. To minimize those dangers, officers sometimes break a window to distract the occupants' attention and draw them to a visible position. In other cases, officers employ force to open a door quickly in order to prevent the occupants from retrieving weapons. If officers must show a near certainty of physical violence in order to justify that type of damage to a door or window upon entry, they will often be forced to forgo minimally intrusive tactics where those tactics would be effective in avoiding violent confrontation. Because the Ninth Circuit's incorrect focus on property damage in evaluating no-knock entries conflicts with the approach employed by other circuits and has dangerous consequences for law enforcement, this Court's review is warranted.[11]

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[11] This Court has granted certiorari in *Richards* v. *Wisconsin*, No. 96-5955 (to be argued Mar. 24, 1997), which presents the question whether it is always reasonable for officers executing a narcotics-trafficking search warrant to make an immediate, no-knock entry. This case presents a distinct knock-and-announce issue, as the warrant in this case was to search for a fugitive (rather than drugs) and the Ninth

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 1997

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Circuit's rule turns on a consideration—damage to property—that is not at issue in *Richards*.

## APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 95-30158
D.C. No. CR-94-00379-1-ALH

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

*v.*

HERNAN RAMIREZ, DEFENDANT-APPELLEE

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Appeal from the United States District Court
for the District of Oregon
Ancer L. Haggerty, District Judge, Presiding

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[Filed: Aug. 2, 1996]

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### OPINION

Before: STEPHEN REINHARDT, ALEX KOZINSKI, and FERDINAND F. FERNANDEZ, Circuit Judges.

Opinion by Judge FERNANDEZ; Dissent by Judge KOZINSKI

FERNANDEZ, Circuit Judge:

Hernan Ramirez was indicted for being a felon in possession of firearms. 18 U.S.C. § 922(g)(1). The district court determined that the firearms had been discovered in connection with a violation of Ramirez's

rights under the knock-and-announce law. 18 U.S.C. § 3109. It, therefore, suppressed the evidence of the weapons, and the United States appealed. We affirm.

## BACKGROUND

On November 5, 1994, Ramirez and his wife awoke out of their peaceful slumbers to a series of unusual sounds, including the breaking of a window. Their child, too, awoke and started crying. They feared that they were being attacked by burglars. They were not, but by the end of the day Ramirez found himself in the custody of federal agents and charged with a crime—felon in possession of a firearm—which could lead to a lengthy period of incarceration. How he found himself in that predicament takes some telling.

Just three days before, Alan Laurence Shelby had knocked a deputy sheriff down and escaped from custody. He was then facing a term of federal imprisonment of 248 months and had declared that he would not do federal time. He had tried to escape before. One time he had struck an officer, kicked out a jail door, stolen an automobile, and rammed a police vehicle as he attempted to get away. Another time he had attempted to escape by using a rope made from torn bedsheets. At some time in the past he had also threatened to kill witnesses, and, it was said, he had tortured someone with a hammer.

The authorities were understandably anxious to get Shelby back, so they sent out a press release. Almost immediately, on November 3, 1994, a reliable confidential informant contacted Bureau of Alcohol, Tobacco and Firearms Special Agent George H. Kim and told him that he had seen a person he believed to be Shelby at Ramirez's home the day before. Agent



Kim and the informant then drove out to the area, and from some distance away they saw a person who was "very similar to" a photo of Shelby and noted that the man was wearing a blue jumpsuit and was clean-cut. That was the person the confidential informant had seen there the day before. Thereupon, a deputy marshal also went out, and from 1,000 yards away he saw a clean-cut man wearing blue sweats come out of the house. The marshal decided that the man was the person whom Agent Kim had seen.

In the afternoon of the next day, a warrant to arrest Shelby at Ramirez's home was obtained, and that led to the early morning raid on November 5, which brought Ramirez, but not Shelby, into the clutches of the law.

Ramirez's fateful day unfolded in this way. In the predawn hours of November 5, Ramirez, his wife, and their three-year-old child were asleep in their abode. The main house had three bedrooms, a livingroom, an activity room, and a kitchen which led into a small utility room, which, in turn, led into an attached garage. The informant, who said that Shelby was at the house, also "indicated there were supposed to be several guns in the garage." Apparently there were not, and apparently the informant had never seen them there. Nevertheless, that is what he had said.

At 6:15 a.m., 45 armed officers converged on the property. The group included S.W.A.T. teams of state, county, and city officers. The officers set up a portable loud speaker system and began announcing that they had a search warrant, but without waiting for a response they broke the window of the garage and began waving a gun through that window, a maneuver

that was not too efficacious because a curtain got in the way.

The Ramirezes had no idea that police were outside their home, but they did hear the disturbance, did hear the breaking of glass, and thought that they were being burglarized. They feared for their safety and for the safety of their three-year-old child. Thus, in order to frighten the intruder off, Mr. Ramirez obtained a pistol from a utility closet and fired it toward the ceiling of the garage. The officers fired back and shouted "Police." At that point, and only at that point, the occupants of the house realized that it was law enforcement officers who had broken into the home. Ramirez "ran to the livingroom, threw away the firearm across the floor, and threw himself on the floor in a prone position, shaking from fright." By 6:35 a.m., he and his wife, with their child in her arms, had walked out of the house and into police custody. These householders were the only persons captured in the raid. Shelby was nowhere to be found, although Ramirez acknowledged that a photo of Shelby looked like a person who might have been there on November 3.

Based on what occurred at the house that morning, a second warrant was obtained, the gun which Ramirez had fired and another one were seized, and Ramirez found himself in the toils of the law.

**JURISDICTION AND STANDARD OF REVIEW**

The trial court had jurisdiction over this matter pursuant to 18 U.S.C. § 3231. We have jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3731.



In general, we review determinations of motions to suppress de novo. *United States v. Khan*, 993 F.2d 1368, 1375 (9th Cir. 1993). The trial court's factual findings are reviewed for clear error. *United States v. Negrete-Gonzales*, 966 F.2d 1277, 1282 (9th Cir. 1992). Where no findings of fact were made or requested, this court will uphold a trial court's denial of a motion to suppress if there was a reasonable view to support it. *United States v. Rabe*, 848 F.2d 994, 997 (9th Cir. 1988). The mixed fact and law question of exigent circumstances justifying a failure to comply with the statutory knock and announce provisions of 18 U.S.C. § 3109 is reviewed de novo. *United States v. McConney*, 728 F.2d 1195, 1205 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824, 105 S. Ct. 101, 83 L. Ed. 2d 46 (1984).

*United States v. Becker*, 23 F.3d 1537, 1539 (9th Cir. 1994).

**DISCUSSION**

**A. *Knock and Announce*.** We have previously had occasion to expatiate on the important role that the Fourth Amendment plays in the protection of our homes—the centers of our family life and our refuge from the rude world. We must now cover that ground again.

As we said in *Los Angeles Police Protective League v. Gates*, 907 F.2d 879, 884 (9th Cir. 1990):

> Nowhere is the protective force of the fourth amendment more powerful than it is when the sanctity of the home is involved. *Boyd v. United States*, 116 U.S. 616, 630, 6 S. Ct. 524, 532, 29 L. Ed.

746 (1886); *United States v. Shaibu*, 895 F.2d 1291, 1293 (9th Cir. 1990) [, *amended and superseded by*, 920 F.2d 1423 (9th Cir. 1990)]; *United States v. Winsor*, 846 F.2d 1569, 1574 (9th Cir. 1988) (en banc). The sanctity of a person's home, perhaps our last real retreat in this technological age, lies at the very core of the rights which animate the amendment. Therefore, we have been adamant in our demand that absent exigent circumstances a warrant will be required before a person's home is invaded by the authorities. *See Shaibu*, at 1293; *United States v. George*, 883 F.2d 1407, 1411 (9th Cir. 1989).

The amendment's force, however, extends even beyond the obtaining of a warrant. Even if a warrant issues, the concerns which lie at the heart of the amendment continue to evoke our solicitude. Our "concern for the privacy, the safety, and the property of our citizens continues. . . ." *Becker*, 23 F.3d at 1540. That concern is reflected in knock-and-announce requirements. As the Supreme Court recently said, "[i]n evaluating the scope of [our Fourth Amendment] right, we have looked to the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing." *Wilson v. Arkansas*, — U.S. ——, ——, 115 S. Ct. 1914, 1916, 131 L. Ed. 2d 976 (1995). Among those traditions was "[t]he common law knock-and-announce principle [which] was woven quickly into the fabric of early American law." *Id.* at —, 115 S. Ct. at 1917. The Court, therefore, concluded that as a matter of constitutional law "the method of an officer's entry into a dwelling was among the factors to be considered in assessing the reasonableness of a



search or seizure." *Id.* at —, 115 S. Ct. at 1918. For our purposes, the tradition finds an even more direct expression of societal concern. "It finds expression in the knock and announce statute which allows an officer to 'break open any outer or inner door of a house . . . to execute a search warrant if, after notice of his authority and purpose,' he is refused admittance. 18 U.S.C. § 3109." *Becker*, 23 F.3d at 1540. We insist upon this notice because, as individuals, we fear for our privacy in the face of government might, and we fear for our property and our safety as well.

> "The fear of a smashing in of doors by government agents is based upon much more than a concern that our privacy will be disturbed. It is based upon concern for our safety and the safety of our families. Indeed, the minions of dictators do not kick in doors for the mere purpose of satisfying some voyeuristic desire to peer around and then go about their business. Something much more malevolent and dangerous is afoot when they take those actions. It is that which strikes terror into the hearts of their victims. The fourth amendment protects us from that fear as much as it protects our privacy. . . ."

*Id.* at 1540 (citation omitted). *See also Soldal v. Cook County*, 506 U.S. 56, 62-63, 113 S. Ct. 538, 544, 121 L. Ed. 2d 450 (1992). As concerned citizens we also fear the needless injuries that might be inflicted upon police officers, or upon a homeowner, as a result of the homeowner's mistaken belief that miscreants are invading his little castle. *See Sabbath v. United States*, 391 U.S. 585, 589, 88 S. Ct. 1755, 1758, 20 L. Ed. 2d 828 (1968) (one facet of rule is to safeguard officers

from injuries inflicted by mistaken homeowners). So it was here. Had Ramirez been less reasonable, the officer at the window might have been killed; had Ramirez been less wise, he or his family might have been killed. As it was, his property was needlessly damaged when his home was broken into.

When the officers executed the warrant they brushed aside the wisdom of history and elicited a response which, if not strictly intended, should have been reasonably foreseen. They seek to excuse their conduct on the grounds that the dangerousness of Shelby resulted in an exigency which permitted them to break into the home of Ramirez without following knock-and-announce requirements.

No doubt exigent circumstances can justify breaking into a house without notice, but "incantation of that phrase does not dissolve the shield that our law provides." *Becker*, 23 F.3d at 1540. When exigency is claimed, we must determine what kind of exigency it was. "We have held that even a mild exigency, like knowledge that a person is dangerous, can justify immediate entry where that can be done without any physical disruption of property. That, of course, is not this case." *Id.* (citations omitted). Here, an officer broke into the home through a window, poked a gun through the window, and was ready to fire the weapon if he deemed it necessary to do so. It takes more than a mild exigency to justify that. "To justify physical destruction of property '[m]ore specific inferences of exigency are necessary.'" *Id.* at 1541 (citation omitted). Was there more? We think not.



Consider. The 45 officers did not fear any of the actual residents of the house and were not attacking a gang or cult hangout where they might be met by a fusillade of gunfire. They were concerned about one person, Shelby, who might be on the premises. But Shelby was not known to have ever shot or shot at anyone. He was an escape artist, who said he would not go to federal prison. He had knocked people down in his escape attempts, and he had stolen a car and run into a police vehicle. His violence towards law enforcement had not extended beyond that, even though he had obviously been arrested on some occasions. Perhaps his degree of dangerousness bespoke a mild exigency. Certainly it did not bespeak more. In *United States v. McConney*, 728 F.2d 1195 (9th Cir.) (en banc) *cert. denied*, 469 U.S. 824, 105 S. Ct. 101, 83 L. Ed. 2d 46 (1984), for example, we found a mild exigency when an officer knew that McConney was a member of Hell's Angels, had a conviction for a violent crime, was a drug dealer, and had spoken of protecting club members. *Id.* at 1206. That justified an announcement and a simultaneous entry through an unlocked screen door. *Id.*

On the other hand, in a case where a person in a drug dealer's apartment was known to own a gun, but there was no indication that he had the gun with him, we found no exigent circumstances at all. *See United States v. Fluker*, 543 F.2d 709, 717 (9th Cir. 1976). And in *United States v. Mendonsa*, 989 F.2d 366, 370-71 (9th Cir. 1993), we found the circumstances insufficient to justify breaking into a house after the police heard a little noise, even though an occupant was a drug dealer who had a prior felony conviction for armed robbery. We also found no exigency where all

the police had was a generalized concern about drug dealers. *See United States v. Moreno*, 701 F.2d 815, 817-18 (9th Cir. 1983), *vacated on other grounds*, 469 U.S. 913, 105 S. Ct. 286, 83 L. Ed. 2d 223 (1984). The same sort of generalized unspecific concerns proved insufficient in *Becker*, 23 F.3d at 1541.

We did find a mild exigency in *United States v. Von Willie*, 59 F.3d 922 (9th Cir. 1995), where the police sought to execute a search warrant at the home of an armed warlord for a motorcycle gang. *Id.* at 924. In that case, the police did attempt to comply with § 3109 at one door, did comply with it at another door, but seized Von Willie at still a third door without compliance after he had seen them and was trying to shut them out. Under the combination of what was known before plus what happened on the scene, we validated an entry which took place with no destruction of property. *Id.* at 925-26. Similarly, in *United States v. Scott*, 74 F.3d 175 (9th Cir. 1996), *petition for cert. filed*, (June 6, 1996) (No. 95-9248), we found a mild exigency. The police arrived on the scene to execute a warrant. Scott opened the blinds and saw them; he had a weapon in his hand. *Id.* at 176. He then attempted to close an open door, as the police announced their presence and that they had a warrant. They then forced their way into the room. *Id.* at 177. We were satisfied that there was a mild exigency, and we excused any failure to comply with the knock-and-announce rule. *See also United States v. Reed*, 15 F.3d 928, 934 (9th Cir.1994) (likely armed suspect saw the police and closed the door). None of those circumstances inform the case at hand. There is no suggestion that the police presence was known, no confirmation that Shelby was on the premises, and, more



importantly, no indication that Shelby was armed and would resist with deadly force.

We were considerably more impressed when the police knew that the person they were after had a gun and had heard him say that he kept the gun to use against the police themselves. *United States v. Turner*, 926 F.2d 883, 885 (9th Cir.), *cert. denied*, 502 U.S. 830, 112 S. Ct. 103, 116 L. Ed. 2d 73 (1991). We were equally impressed in *United States v. Perez*, 67 F.3d 1371, 1384 (9th Cir. 1995), *reh'g en banc granted*, 77 F.3d 1210 (9th Cir. 1996), and for much the same reasons. There the police on the scene realized that Perez probably knew they were present. Moreover, he was probably armed, had killed before, and had said that if arrested "he intended to 'go down shooting.'" *Id.* In both cases we did find more than a mild exigency. Of course, the police had no such information about Shelby. They neither knew that he had a gun, nor that he had access to one, nor that he would consider using one against them.

We have touched upon all of these cases because our review is necessarily fact-bound. Our cases do not describe a simple straight line, rather they graph a much more complex curve. Police must have some leeway in balancing the demands of the knock-and-announce requirement against other safety considerations. Nevertheless, the courts must ultimately determine whether the police struck that balance properly. We think it clear that the police did not do so in this case.

Again, the householders themselves presented no known danger. If he was there, Shelby might wish to escape, but the phalanx of already positioned officers on hand made escape unlikely. Moreover, there was

no specific evidence that Shelby was armed, that he would use firearms against the officers, or that when he was faced with that show of force he would do anything violent at all. Also, before the break-in nothing developed on the scene which would have added to the circumstances already known and, thus, raise them to a higher degree of exigency. In short, we agree with the district court that the knock-and-announce rules were violated in this case.[1]

**B.** ***Causation.*** When Ramirez walked out of his house and into the arms of the waiting police, he was seized. He then admitted that he had fired the gun, that another gun was on the premises, and that he had previously committed felonies in California. Those admissions and the fact that an officer had seen the discarded pistol in the livingroom led to a second warrant and a seizure of the weapons. It is the use of those weapons in evidence which Ramirez seeks to suppress.[2]

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[1] The careful reader will note that we have assumed that there was probable cause for the issuance of the warrant in the first place. There may well be some doubt about that, when the most that was known was that Shelby had been at Ramirez's house on two occasions two or three days earlier. Nevertheless, we give considerable deference to the issuing magistrate. *See Perez*, 67 F.3d at 1382. Because of that deference and because it is unnecessary to our resolution of this case, we have assumed rather than decided that there was probable cause.

[2] We do not consider the statements themselves, which clearly were not severable from the arrest of Ramirez, because no issue regarding them is before us. *But see United States v. Ricardo D.*, 912 F.2d 337, 342 (9th Cir. 1990) (confession following illegal arrest suppressed).



Because the initial entry into Ramirez's house was illegal, he is entitled to have the weapons suppressed if "the police obtained the evidence 'by exploitation of the illegality.'" *United States v. Jones*, 608 F.2d 386, 390 (9th Cir. 1979) (quoting *Wong Sun v. United States*, 371 U.S. 471, 488, 83 S. Ct. 407, 417, 9 L. Ed. 2d 441 (1963)). It is clear that a mere "but for" causal connection will not lead to suppression. Rather, we must conduct an inquiry by applying three tests:

> First, we consider the proximity of the illegal arrest with the seizure of the evidence. Second, we consider whether there were independent intervening events that led the police to the evidence. Third, we consider the effect of suppression on the exclusionary rule's purpose of deterring police misconduct. The three factors are closely interrelated.

*United States v. Shephard*, 21 F.3d 933, 939 (9th Cir. 1994) (citation omitted); *see also Jones*, 608 F.2d at 391.

The first of these factors is easily met; the seizure of the guns could hardly be more proximately linked to the police break-in itself. They came as the most direct, if not the only, result of the morning's activities. Similarly, there can be little doubt that suppression would serve to dissuade the police from this kind of unnecessary invasion of people's homes. It would encourage, even exhort, them to use more caution. Only a particularly cynical view of government would induce us to think otherwise. The third factor weighs in favor of suppression.

That leaves the second factor—was there an independent intervening event? We think not, but that requires a bit more explanation. In the mine run of cases, the determination is relatively straightforward. If an unlawful search follows directly on the heels of an unlawful arrest, suppression will likely follow. *See, e.g., Shephard*, 21 F.3d at 939-40; *cf. Jones*, 608 F.2d at 390-91. If an unlawful search ultimately leads to the seizure of tangible materials, they, too, will be suppressed if their connection is close enough. *See Murray v. United States*, 487 U.S. 533, 536-38, 108 S. Ct. 2529, 2532-33, 101 L. Ed. 2d 472 (1988); *United States v. Hill*, 55 F.3d 479, 481 (9th Cir. 1995); *United States v. Santa Maria*, 15 F.3d 879, 883 (9th Cir. 1994). If a confession is closely tied to an illegal arrest, suppression will often follow. *See Orhorhaghe v. INS*, 38 F.3d 488, 504 (9th Cir. 1994); *Ricardo D.*, 912 F.2d at 343. The principles which animate these cases would seem to lead directly to a conclusion that suppression is required in this case. However, the government claims that there was an intervening event which broke the causal chain. That event was Ramirez's firing of the pistol at the ceiling when he thought that would help protect his family against malevolent intruders. We disagree with the government.

There was no gap or attenuation between the break-in and the firing of the weapon. More than that, the police were very lacking in perspicacity if they failed to foresee the reaction they encountered. What could they have expected when they broke into the home of a sleeping family in the early hours of the morning? If they did not intend to elicit a strong protective reaction, they must have willfully blinded themselves



to that possibility. *Cf. United States v. Jewell*, 532 F.2d 697, 700-04 (9th Cir.) (en banc), *cert. denied*, 426 U.S. 951, 96 S. Ct. 3173, 49 L. Ed. 2d 1188 (1976); *United States v. Aguilar*, 80 F.3d 329, 332-33 (9th Cir. 1996) (en banc).

The government, nevertheless, says that when a new illegal act intervenes, the chain is broken because police illegality should not be taken to justify citizen illegality. That general proposition is accurate enough in the abstract, but the cases which support it have no application here. No doubt a homeowner is not justified in aiming a semiautomatic weapon at persons he knows to be police officers, even if they happen to have entered his home illegally. *See United States v. Waupekenay*, 973 F.2d 1533, 1537-38 (10th Cir. 1992). Similarly, when an officer is engaging in an illegal arrest, if the suspect engages in illegal resistance, that new violation may well justify a new and proper arrest. *See United States v. Dawdy*, 46 F.3d 1427, 1431 (8th Cir.), *cert. denied*, 423 U.S. 934, 116 S. Ct. 195, 133 L. Ed. 2d 130 (1995). We reached just that conclusion in *United States v. Garcia*, 516 F.2d 318 (9th Cir.), *cert. denied*, 423 U.S. 934, 96 S. Ct. 290, 46 L. Ed. 2d 265 (1975). In that case officers ordered Garcia to pull over at what we assumed to be an illegal checkpoint. Garcia did so at first, but then sped off and led the officers on a high-speed chase. *Id.* at 319. That illegal flight and the ensuing chase supplied the necessary intervening activity to justify Garcia's arrest. *Id.* at 320. We said that unless the officers had acted for the very purpose of initiating the chase activity, we would not find the second stop to be illegal. *Id.* at 319-20; *cf. United States v. Ogilvie*, 527 F.2d 330, 332 (9th Cir. 1975)

(explaining the limitations of Garcia); *United States v. Morrison*, 546 F.2d 319, 320 (9th Cir. 1976) (same).

In the case at hand, Ramirez did not threaten or flee from persons whom he knew to be police officers. Quite the contrary. He fired a gun at the ceiling of his own home when unknown intruders were invading it. The government does not claim that he committed a crime when he did that, unless, of course, the crime was the fact that he had a gun at all. But to the extent that it was a crime for him to have a gun, that crime did not intervene. It existed before the police engaged in their unlawful intrusion. That crime was brought to light by the intrusion itself. We agree with the Eleventh Circuit's determination that if the act of a suspect is not a new and distinct crime, but is simply a legal act which reveals the fact of some crime—such as possession of an illegal substance— it will not erase the taint. *United States v. Bailey*, 691 F.2d 1009, 1016-17 (11th Cir. 1982), *cert. denied*, 461 U.S. 933, 103 S. Ct. 2098, 77 L. Ed. 2d 306 (1983). To paraphrase that decision: Ramirez was in possession of the gun before the police misconduct occurred, and his response to the misconduct only revealed this extant crime and did not itself constitute a crime—*i.e.*, firing a gun at the ceiling of his own home to scare off intruders is not a crime; possessing the weapon is. *Id.* at 1017.

We, therefore, determine that there was no intervening event, the second element of our analysis favors suppression, and suppression must follow.



## CONCLUSION

The flame of our Fourth Amendment liberties is bright and strong—that should come as no surprise. It has been tended by lovers of liberty for over two centuries. While it burns, it keeps our homes free from unlawful intrusions by the government. Still, it is just a flame, and it will be quickly quenched if it is not protected. Should that occur, a tenebrific atmosphere would envelop our liberties and our homes. That must not happen.

We hold that Ramirez's statutory and Fourth Amendment rights were violated when government agents broke into his home in the early morning hours without complying with the knock-and-announce requirements. We also hold that the district court correctly suppressed use of the seized weapons as evidence against him.

AFFIRMED.

KOZINSKI, Circuit Judge, dissenting.

1. The majority opens up a square conflict with *United States v. Turner*, 926 F.2d 883 (9th Cir.), *cert. denied*, 502 U.S. 830, 112 S. Ct. 103, 116 L. Ed. 2d 73 (1991), a case where we upheld a no-knock entry. In *Turner*, police forced open a locked apartment door and entered the defendant's bedroom; Turner argued the no-knock entry was illegal because the police couldn't be sure he was armed, but we upheld the search. The majority contrasts Turner with Shelby, characterizing the former as a "considerably more impress[ive]" threat, maj. op. at 9466, and the latter as an "escape artist" whose "degree of dangerousness bespoke a mild exigency," if that. *Id.* at 9465.

The record contradicts the majority's romantic description of Shelby—a hardened and desperate criminal, much more dangerous than Turner. But words are cheap; here are facts:

| | Turner | Shelby |
|---|---|---|
| Current access to guns | Highly likely | Highly likely |
| Past access to guns | "Turner kept weapons in the apartment he used for his drug operations." | "Shelby was a major Methamphetamine manufacturer and has had access to large caches of weapons." |



| | | |
|---|---|---|
| Threatened police | Yes | Yes |
| Threatened police | No | Yes |
| Escape attempts | 0 | 3 |
| Police and civilians assaulted | 0 | 3 |
| People tortured | 0 | 1 |
| Criminal Record | 1 conviction for receiving stolen property, 17 years earlier | Serving 20 years plus, on state and federal charges for dealing methamphetamines and using a gun in a drug transaction. |
| Knew police were looking for him | No | Yes |

My colleagues trip lightly over the fact that Shelby had "a history of violent escapes." ER at 22. But, in his dogged efforts to flee from custody, Shelby not only struck two law enforcement officers, but "assaulted a woman in a parking lot and stole her vehicle," *id.*; he then crashed into a police car in making his getaway. Assaulting helpless civilians and then using a ton of mechanized steel as a battering ram hardly comports with the majority's characterization of Shelby as a latter-day Harry Houdini. The ma-

jority also dismisses reports of Shelby's torture activities with "it was said," as if to suggest they lacked substance. Maj. op. at 9459. But the record is positive on this point: "Alan Shelby has brutally tortured others in the past with a hammer." ER at 22. The majority's characterization of Shelby as "[p]erhaps . . . mildly dangerous," is more than mildly off the mark.

The majority posits two main distinctions between Shelby and Turner. First, it argues, Turner had threatened to kill police while Shelby had not. Wrong. Shelby had "made threats to kill witnesses and police officers associated with his incarceration." ER at 22. Next, the majority says, the police here didn't know Shelby had access to weapons, while the police in *Turner* did. Wrong again. In *Turner*, the police only knew that the suspect was armed at another location. Turner claimed the police had no way of knowing he would carry a gun with him, but we rejected his argument: Although "[the police] may not have had specific information that Turner currently had weapons, . . . the facts they did have made this highly likely." 926 F.2d at 887.

Here, the police had more information about the suspect's access to weapons than in *Turner*. According to the Confidential Reliable Informant (CRI), Shelby was hiding in the home of another suspected drug dealer, ER at 52; two law enforcement officers confirmed that someone matching Shelby's description was on the premises. ER at 23-24. The Informant also told police that "there were supposed to be guns in the garage," ER at 52, a garage attached to the house where Shelby was thought to be hiding. Police thus not only were informed that Shelby was



at that location, but that there were guns there—something the police in *Turner* merely surmised. The police in our case did have to infer that Shelby or someone else in the house might go for the guns if cornered but, as we said in *Turner*, "the facts that [the police] did have made this highly likely." 926 F.2d at 887.

The majority's every effort to disparage the search here only underscores the conflict with *Turner*. The majority criticizes the police for failing to recognize they "were not attacking a gang or cult hangout where they might be met by a fusillade of gunfire," maj. op. at 1301; the same was true in *Turner*. The majority complains that "[t]here is no suggestion that the police presence was known," *id.* at 1302; Turner complained about the exact same thing. *See* 926 F.2d at 887. The majority points out that "the phalanx of already positioned officers on hand made escape [by Shelby] unlikely," maj. op. at 1302; in *Turner*, we held that "[t]he number of officers surrounding the building and Turner's lack of prior charges for escape are irrelevant." 926 F.2d at 887. The majority carps, "Shelby was not known to have ever shot or shot at anyone," maj. op. at 1301; Turner hadn't even committed a violent crime. Every argument the majority makes here was considered and rejected in *Turner*.[1]

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[1] Any material differences between this case and *Turner* cut against the majority's conclusion. First, the intrusion in *Turner* was much more serious than that here. In *Turner*, police broke into the apartment and "found Turner in bed with a woman." 926 F.2d at 886. Here, they broke a single window of the *garage* where they were told the guns were located and poked a gun through the hole. Quite clearly, this was an effort to keep Shelby (or whoever else was in the house) from making

My colleagues try to duck *Turner* by claiming that our cases "graph a . . . complex curve." *Id.* at 9467. But if the law is that much in turmoil, we must call for sua sponte en banc. *See Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477, 1479 (9th Cir. 1987) ("A panel faced with [an irreconcilable] conflict must call for en banc review. . . ."). In fact, there is no pre-existing conflict because *Turner* is the only case on point. The other cases the majority cites did not involve the breaking of property;[2] no more than a mild exigency was thus required to uphold those entries. These cases did not—could not—speak to whether a more serious intrusion was warranted.

The majority's ruling not only creates a circuit conflict, it's bad law on its own terms. There is much rhetoric in the opinion about the sanctity of every man's "little castle," but the principal reason we can sleep safely at night is that the men and women of law enforcement put their lives on the line to keep our

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a run for the weapons. While the maneuver failed, it was a rational and measured effort by the police to deal with the dangerous situation presented to them. The search here was also much less troublesome than in *Turner* because police had obtained a no-knock warrant. In *Turner*, police decided to break down the door unilaterally and on the spur of the moment. Finally, unlike in *Turner*, police here tried, albeit unsuccessfully, to announce their presence. ER. at 53 (the police announced their presence over a loud speaker, but Ramirez could not determine what was going on); *see United States v. Moreno*, 701 F.2d 815, 817 n.3 (9th Cir. 1983) ("An attempt to notify by knocking and announcing complies with the statute whether or not it is heard."), *vacated on other grounds*, 469 U.S. 913 (1989).

[2] *E.g., United States v. VonWillie*, 59 F.3d 922 (9th Cir. 1995); *United States v. Scott*, 74 F.3d 175 (9th Cir. 1996); *United States v. Reed*, 15 F.3d 928 (9th Cir. 1994).



castles from being invaded by brutal criminals. When police track down "a major Methamphetamine manufacturer[, who] has had access to large caches of weapons" and a history of torture and other violent conduct, they are entitled to take precautions. A castle, little though it be, often looks like a fortress from the outside; police cannot know what's lurking within. It's easy enough, sitting in our well-guarded offices, and with the benefit of hindsight, to issue pronouncements about what the police should or could have done, but this provides little useful guidance to police in the field who must make difficult judgments in unknown territory and subject to unpredictable developments. What if the police had adopted the majority's rosy view of Shelby and had politely tapped at the door and asked if he would come along, but Shelby had seized the guns in the garage, taken the Ramirez family hostage and precipitated a shoot-out? No doubt, we would then have issued a similarly smug opinion, this time lecturing the police that they were not free to ignore the words and warnings of their CRI, and affirming the payment of compensation to the Ramirezes or anyone else harmed in the altercation.

My guess is that, had any of us been in charge of this operation—had we been responsible for the lives and safety of dozens of law enforcement officers and the family sleeping inside—we would have done just what the police here did. To have done less would have been foolhardy (my colleagues' high-fallutin' rhetoric notwithstanding); to have done more would have been excessive. The police properly balanced the homeowner's privacy and property interests against the dictates of security. *See Wilson v. Arkansas*, 115 S.

Ct. 1914, 1918 (1995) ("The Fourth Amendment's flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests."); *United States v. Bustamante-Gamez*, 488 F.2d 4, 10 (9th Cir. 1973) ("[I]t has never been suggested that the [no-knock] requirement is an inflexible one; both at common law and in the constitutional context the courts have acknowledged that the interests [protected by the rule] may give way to other considerations."), *cert. denied*, 416 U.S. 970 (1974). They deserve to be congratulated, not chastened and ridiculed.

2. Even had the no-knock search been illegal, this would provide no grounds for suppression of the evidence pertaining to Ramirez. In reaching the contrary conclusion, the majority raises conflicts with two other of our cases, *United States v. Jones*, 608 F.2d 386 (9th Cir. 1979), and *United States v. Garcia*, 516 F.2d 318 (9th Cir.), *cert. denied sub nom. Martinez- Lopez v. United States*, 423 U.S. 934 (1975). In *Jones*, the police arrested the defendant on suspicion of a Los Angeles area burglary and found a motel room key on him; they then searched the room and discovered evidence of an unrelated burglary at San Francisco's Presidio. Although the initial arrest was illegal, evidence obtained from the motel room was not excluded because exclusion could have had no deterrent value. We held it "crucial" that the police were not investigating the Presidio burglary when they illegally found the evidence, because "[d]eterrence can have its effect only when it can be said that an object of the illegal conduct was the securing of the evidence sought to be suppressed." *Id.* at 391



(quoting *Allen v. Cupp*, 426 F.2d 756, 759 (9th Cir. 1970)). Here, the police weren't out to catch a felon in possession; they didn't even know Ramirez owned the house, much less that he was a felon.[3] The object of the supposedly illegal search was the arrest of Alan Shelby for escape; police couldn't possibly be deterred by the threat of exclusion of evidence relating to a completely different person and crime. *Cf. Allen*, 426 F.2d at 759 (exclusion when illegal police conduct inadvertently reveals evidence would merely "make tasting the fruit more difficult, but would not diminish its temptation").

The majority leaps over the deterrence question with a single bound: "[T]here can be little doubt that suppression would serve to dissuade the police from this kind of unnecessary invasion of people's homes." Maj. op. at 9469. This is contrary to *Jones* and other cases where we have held that suppression can provide no deterrence when police officers, through

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[3] Ramirez apparently was fond of pseudonyms. Utility records indicated a "Hernan Rios" lived at 23170 S.E. Bohna Park Rd. ER. at 24. The CRI, however, said the owner went by "Angel" or "Havannah." *Id.* DMV records showed an "Angel Rios" had a driver's license in the name "Angel Estrada." *Id.* Even after the raid, the police weren't sure who Ramirez was. The affidavit for the second warrant seeks to search "the premises occupied by Herman Ramirez aka Hernan Ramirez, Angel Estrada." *Id.* at 44.

Ramirez's criminal record was also unknown to the police before the search. After the search, Ramirez told police that his birthday was May 8, 1957, and he had been convicted of burglary in 1981. *Id.* at 45. Only then did a check of police records reveal a Hernan or Herman Ramirez who was born on May 8, 1955 and was convicted of rape in 1978 and burglary with a firearm in 1982. *Id.* at 46.

"investigatory serendipity," stumble across evidence of a crime of which they were previously unaware. *See United States v. Bacall*, 443 F.2d 1050, 1056 (9th Cir.) (it's "crucial to a determination of taint" that police didn't suspect the defendant of the crime for which their illegal activity produced evidence), *cert. denied*, 404 U.S. 1004 (1971); *Durham v. United States*, 403 F.2d 190, 196 (9th Cir. 1968) ("The price is too high and the advantage too uncertain to make it reasonable to suppose that law enforcement officers will be encouraged to indulge in unlawful searches, knowing that what they find will be suppressed, in the hope of obtaining admissible evidence as remote and fortuitously acquired as this.").

The majority creates yet a third conflict, this time with *United States v. Garcia*. Garcia was stopped at an illegal checkpoint but then sped off and was captured; police searched the car and found marijuana. We declined to suppress. The suspect's intervening act, we held, gave police new grounds for probable cause that were untainted because police didn't intend to provoke the response. *Garcia*, 516 F.2d at 320 ("By ordering [the defendant] to stop, the officer could hardly have intended him to flee."). Here, police developed new grounds for searching Ramirez's house when he fired his gun. Following *Garcia*'s rationale, Ramirez's use of the gun was evidence untainted by the (supposed) earlier illegality, unless police *intended* to provoke the response. It's ludicrous to suppose the police broke the garage window hoping to provoke those inside to shoot at them. The majority claims, inexplicably borrowing a deliberate ignorance instruction from substantive criminal law, that the police "willfully blinded themselves to [the] possi-



bility" of Ramirez's response, maj. op. at 9470 (citing *United States v. Jewell*, 532 F.2d 697, 700-04 (9th Cir.), *cert. denied*, 426 U.S. 951 (1976)). But, according to *Garcia*, the test isn't willful blindness, it is intent. Far from intending that the occupants of the house shoot at them, the police here tried to prevent a shoot-out by covering the area where they thought the guns were stored. Because Ramirez's intervening act was not "the *intended result* of illegal police conduct," *Garcia*, 516 F.2d at 319 (emphasis added), it attenuates the alleged taint from the no-knock entry.

* * * * *

Opinions like this lend support to the notion that the Ninth Circuit is not a single court but a series of disaggregated panels whose judges are guided by their predilections rather than precedent. Because I cannot join in this wholesale flouting of circuit authority. I dissent.

**APPENDIX B**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

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Cr. No. 94-379-HA

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

HERNAN RAMIREZ, DEFENDANT

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[Filed: May 4, 1995]

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**OPINION**

HAGGERTY, Judge:

Defendant was indicted for being an ex-felon in possession of firearms. Defendant moves to suppress evidence regarding his possession of the weapons at issue because such evidence was obtained as a direct result of the execution of a warrant that (1) lacked sufficient probable cause, and (2) was unreasonably executed. A hearing was conducted on 24 April 1995, at which oral argument was presented regarding the motion. This court denies the motion to suppress as to the issue of insufficient probable cause, but grants the motion as it pertains to the execution of the warrant.



**BACKGROUND**

Counsel have stipulated to most facts surrounding the issuance of the two warrants involved in this case, and the subsequent arrest and charging of defendant. In the early morning of 5 November 1994, several dozen law enforcement officers encircled defendant's home in Boring, Oregon, to execute a federal search warrant seeking fugitive Alan Lawrence Shelby. Shelby had escaped custody while enroute to testify in a matter in Tillamook County. The United States Marshal obtained a warrant for Shelby's arrest, and conducted a manhunt that led to defendant's home.

On 5 November 1994, law enforcement officers surrounded defendant's residence, identified themselves over bullhorns, and ordered the residence's occupants to come outside. At the same time, officers outside the home's garage shouted "Sheriff - search warrant," and broke a garage window. Defendant fired a gun from inside his home, prompting a hail of return fire from the officers. Defendant was forced from his residence and, after advice and waiver of rights, acknowledged that he was a convicted felon, and that he owned the gun he had fired as well as another weapon. This information, coupled with an officer's observation of a weapon inside defendant's home, was used to obtain a second search warrant permitting officers to re-enter defendant's home later that day to retrieve the weapons. Fugitive Shelby was not found at the residence during either search. Defendant, however, was arrested and charged with being a convicted felon in possession of weapons in violation of 18 U.S.C. § 922(g)(1).

**ARGUMENTS**

Defendant challenges the validity and execution of the first warrant regarding the search for Shelby. That warrant's execution provided the grounds for the second warrant pertaining to defendant's weapons, and led directly to the seizure of those weapons. Defendant contends that the seizure of the weapons must be suppressed because the first warrant seeking Shelby lacked sufficient probable cause and was improperly executed.

**1. Probable Cause**

Defendant first contends that the affidavit submitted in support of the warrant for Shelby was insufficient to justify a conclusion that Shelby was probably on defendant's premises at the time it was to be searched. A magistrate's role is to determine whether, given all the circumstances set forth in the supporting affidavit, there is a fair probability that what is being sought will be found in a particular place. *Illinois v. Gates*, 462 U.S. 213, 238 (1983). The magistrate determines this by considering the totality of the circumstances, and a court reviewing this decision must ask whether the magistrate had a substantial basis for concluding that sufficient probable cause existed to issue a warrant. *Id.*

This court is satisfied that the magistrate had a substantial basis for finding probable cause to believe that the fugitive being sought would be found at defendant's residence. The affiant stated that a confidential, reliable informant reported that he had seen a man named "Alan" at the residence, and that "Alan" had uttered words to the effect that "I had



to knock out a guard." During his escape, Shelby had slipped from his handcuffs and had assaulted an officer.

The informant had provided correct information previously, leading to the arrest of another fugitive, and, when driven to defendant's residence by an officer, the informant identified a man who was washing a car in the driveway as "Alan." The officer with the informant found the man to be similar in appearance to a photograph of Shelby.

The affiant also stated that he had made a second reconnaissance of defendant's residence, and that a man resembling Shelby had emerged from the home during his surveillance. Because of distance, however, a positive identification could not be made.

This affidavit established a substantial basis upon which the magistrate could reasonably conclude that under the totality of the circumstances, there was probable cause to believe that Shelby would be found at defendant's residence. Defendant's motion to suppress is denied as it pertains to the claim that the affidavit failed to establish probable cause.

**2. Execution of the Shelby Warrant**

Defendant also contends that the execution of the first warrant violated his Fourth Amendment rights and did not comply with 18 U.S.C. § 3109. That statute provides:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate

himself or a person aiding him in the execution of the warrant.

*See also United States v. Mendonsa*, 989 F.2d 366 (9th Cir. 1993).

There is no factual dispute that the officers in this case failed to adhere to the knock and announce requirements described by 18 U.S.C. § 3109 when they "announced their identity and purpose but, for safety reasons, broke the garage window before waiting for the occupants to respond." Government's Memorandum in Opposition at 7.

The Ninth Circuit recently stated that the Fourth Amendment's "concern for the privacy, the safety, and the property of our citizens continues and is reflected in knock and announce requirements" such as those established in 18 U.S.C. § 3109. *United States v. Becker*, 23 F.3d 1537, 1540 (9th Cir. 1994). In *Becker*, the court acknowledged that mild exigency, such as knowledge that a person is dangerous, can justify an immediate entry that is done without physical destruction of property. *Id.*

To justify a warrant entry that is accompanied by physical destruction of property, however, more specific inferences of exigency are necessary. *Id.* at 1541. The government acknowledges that the officers' entry into defendant's home included the physical destruction of defendant's garage window. The government contends that highly specific facts known about Shelby, which were reported to the magistrate, establish adequate inferences of exigency as required by *Becker*. Shelby was known to have assaulted a deputy in making his escape a few days before the warrant was executed. He had been convicted of manufacturing methamphetamine, using a firearm during a



crime, and armed robbery. He was reported to have stated that he would "not do federal time." In 1991 Shelby struck a corrections officer and kicked a jail door. During an escape he assaulted a woman, stole her vehicle, and rammed a police car. Shelby was also reported to have made threats to kill witnesses and officers during his incarceration, and prior to his imprisonment, to have tortured other persons with a hammer. He was also thought to have access to large caches of weapons.

This information regarding Shelby was reported in the affidavit supporting the request for a warrant to search defendant's property, and the affiant requested that "the court grant a no-knock warrant exception." Ex. A, attached to Defendant's Memorandum in Support of the Motion to Suppress. Additionally, the government discloses that the officers had information pertaining to the defendant himself that heightened their concerns. Defendant was believed to be selling drugs and storing drugs and guns in his garage.

This Court is satisfied, as was the magistrate, that there were sufficient exigent circumstances to have allowed immediate entry into defendant's residence where entry could be obtained without physical destruction of property. *Becker*, 23 F.ed at 1540; *United States v. McConney*, 728 F.2d 1195, 1206 (9th Cir. 1984) (en banc) (opening of an unlocked screen door was found permissible because of exigent circumstances). The officers' knowledge of Shelby's violent past justified an immediate, no-knock entry into defendant's residence.

Knowledge of Shelby's violent past and defendant's suspected drug activity, however, was insufficient to meet the stricter standard required by *Becker* when

officers physically destroy property while gaining entry into a residence. As the Ninth Circuit recognized in *Becker*, neither knowledge of a possible occupant's prior convictions for armed robbery, nor of the possible possession of a weapon, provides sufficient exigency to justify breaking into a house. Nor is the danger inherent in pursuing drug dealers sufficient to justify an immediate entry that is accompanied by destruction of property. *Becker*, 23 F.3d at 1541.

Although there were specific facts known regarding Shelby's propensity to attempt escape, his disdain for federal incarceration, and his past willingness to use threats and violence as a means of intimidation, there was no information that he was armed and dangerous at defendant's home, or that he would present any specific dangers to arresting officers if found there. There are insufficient exigent circumstances to establish that Shelby presented such a threat to the force deployed to apprehend him in the early morning of 5 November as to justify abandon ing the "simple and ancient requirement that the officer[s] 'ought to signify the cause of [their] coming, and to make request [sic] to open doors'" before destroying property during a governmental intrusion into a person's home. *Becker*, 23 F.3d at 1541.

Defendant had legitimate privacy, property and safety interests which were entitled to protection under the Fourth Amendment. The law officers' decision to compromise those interests by choosing instead to destroy property while intruding suddenly into defendant's home, although prompted by a knowledge of Shelby's past, was not sufficiently supported by circumstances suggesting that the fugitive posed



a particular danger to others during this attempted apprehension.

**CONCLUSION**

Because the specific inferences of sufficient exigency which must accompany the physical destruction of property during an unannounced entry are lacking in this case, defendant's motion to suppress must be granted as to this issue. There is no dispute that the basis for the second search warrant of defendant's home, and the subsequent seizure of the weapons, were direct consequences of the manner in which the first warrant was executed. For the reasons stated above, this court concludes that the manner of this execution was improper, and the subsequent "fruit" of the improper execution is tainted and must be suppressed.

Defendant's motion to suppress is denied as to the contention that the initial search warrant was unsupported by probable cause. The motion to suppress is granted, however, as it pertains to the law officers' violation of the protections afforded defendant under the Fourth Amendment and 18 U.S.C. § 3109. The seizure of the weapons found in defendant's possession, which resulted directly from an improper warrant execution during the early morning of 5 November 1994, is suppressed.

Dated this 4 day of May, 1995.

/s/ ANCER L. HAGGERTY
ANCER L. HAGGERTY
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

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Cr. No. 94-379-HA

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

HERNAN RAMIREZ, DEFENDANT

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[Filed: May 4, 1995]

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**ORDER**

HAGGERTY, Judge:

Defendant's motion to suppress (doc. # 19) is denied in part and granted in part. The motion is denied as to the contention that the initial search warrant was unsupported by probable cause. The motion to suppress is granted, however, as it pertains to the law officers' violation of the protections afforded defendant under the Fourth Amendment and 18 U.S.C. § 3109.

The seizure of the weapons found in defendant's possession which resulted directly from the improper warrant execution during the early morning of 5 November 1994, is suppressed.

IT IS SO ORDERED.

Dated this 4 day of May, 1995.

/s/ ANCER L. HAGGERTY
ANCER L. HAGGERTY
United States District Judge



**APPENDIX C**

## AFFIDAVIT

I, Wayne Kauffmann, being duly sworn do hereby depose and say:

1. I am a Deputy U.S. Marshal and have been so employed for 5 years.

2. On November 2, 1994, the U.S. Marshals Service in Portland, Oregon, received information that a prisoner named Alan Lawrence Shelby had escaped from the Tillamook County Sheriff on November 1, 1994. Alan Shelby had slipped out of his handcuffs during transport and assaulted a Deputy Sheriff by knocking him down. Shelby then fled on foot and has not been seen since.

3. I then reviewed the file on Alan Shelby and obtained the following facts.

A. That Alan Lawrence Shelby was sentenced on Criminal Case Number: CR.91-60195-1 charging Conspiracy to Manufacture, Possession with Intent to Distribute and Distribution of Methamphetamine, in violation of 21 USC 841(a)(1) and 846, and the charge of Use of a Firearm During a Drug Crime, in violation of 18 USC 924(c).

B. That Alan Lawrence Shelby was sentenced on August 31, 1992 by the Honorable Michael R. Hogan, United States District Judge for the District of Oregon, for a period of 188 months on count 1 of the

Indictment, and 60 months consecutive on count 2 of the Indictment.

C. That Alan Lawrence Shelby had a history violent escapes in his criminal history.

D. That Alan Shelby made statements in the past, overheard by OSCI officers that he planned to escape from a transport van when he had a chance. Shelby also stated that he "will not do federal time".

E. That Alan Shelby was serving a concurrent Federal Sentence with his State Sentence at the Oregon State Penitentiary.

F. That Tillamook County Sheriff took temporary custody of Alan Shelby and transported him to the Tillamook County Courthouse.

G. That Alan Shelby escaped from custody as he stated he would.

H. That Alan Shelby attempted escape in 1991 by striking a corrections officer in the face and kicking out the door of the jail. Shelby ran from the jail and assaulted a woman in a parking lot and stole her vehicle. During the escape attempt, Shelby rammed a police vehicle with the stolen vehicle.

I. That while awaiting trial in Eugene on Narcotics and Weapons charges, Shelby attempted to escape from the Lane County Jail by constructing a rope made from torn bed sheets and breaking a window.

J. That Alan Shelby has made threats to kill witnesses and police officers associated with his incarceration.



K. That Alan Shelby has brutally tortured others in the past with a hammer.

L. That Alan Shelby was a major Methamphetamine manufacturer and has had access to large caches of weapons.

4. Based on this information, a task force was established which consisted of the following agencies: U.S. Marshals, FBI, Oregon Department of Corrections and the Tillamook County Sheriff's Office. A press release was sent to the media requesting all information on Shelby be given to the U.S. Marshals Task Force. Numerous leads were established in the Eugene area.

5. On November 3, 1994, I received information from George Kim, a Special Agent with the Bureau of Alcohol, Tobacco and Firearms (AFT). Agent Kim had received information from a Confidential Reliable Informant (CRI) regarding the fugitive, Alan Shelby. This CRI has given very reliable information to the AFT in the past, including information that led to the arrest of a fugitive felon. The CRI stated that the CRI had seen a person believed to be Alan Shelby at a residence located at: 23170 S.E. Bohna Park Rd; Boring, Oregon. The CRI also overheard "Alan" make a statement approximating the following: "I had to knock out a guard". At the time the statements were made, the CRI thought nothing about it. The next day, the CRI read an article describing the escape, and relayed the information to Agent Kim.

6. Agent Kim then took the CRI out near the house which is located on the Clackamas County line in Boring, Oregon. Agent Kim and the CRI saw a man

who they believed to be Alan Shelby, outside the residence washing a car. Agent Kim described the man they saw was very similar to the photograph of Alan Shelby. The CRI also stated that this man was the same person the CRI had seen previously at the residence. Agent Kim said this person was very clean cut and wearing what appeared to be a blue jumpsuit or coveralls.

7. I then drove out to this residence with other Deputy U.S. Marshals. The residence is located in a rural area on about 10 acres of property. I was able to view the residence from a nursery approximately 1000 yards away. The residence appears to be a light colored tan brick single family house with a circular driveway. There are numerous outbuildings which include at least 2 travel trailers, a large blue shed, and a smaller green shed. I saw a man come out of the house wearing what appeared to be dark blue sweats, and very clean cut. From the distance, I couldn't make a positive I.D. but I believe it was the same person described by agent Kim.

8. The CRI stated that the person who resides at 23170 S.E. Bohna Park Rd. is known as Angel or Havannah. A PGE power check lists the subscribers as Hernan Rios and Cynthia Rios. I also received information from DMV that Angel Rios has an Oregon Drivers License under the name Angel Estrada.

9. The latest description information from law enforcement sources describe Alan Lawrence Shelby as a white male, date of birth of 03-23-66, 5 feet, nine inches tall, 160 pounds, with blue eyes and brown hair.



10. Based on this information, I believe Alan Shelby is currently hiding at the residence at: 23170 S.E. Bohna Park Rd. Boring, Oregon. I also believe Alan Shelby is an extreme danger to law enforcement officers and thereby request the court grant a no-knock warrant exception. I also request that the court grant permission for night time service on this warrant.

11. Based on this information, I request the permission for a search warrant on the residence located at 23170 S.E. Bohna Park Rd. for the body of Alan Lawrence Shelby.

10. Shelby is currently the subject of an arrest warrant in this district for the federal charge of Escape in violation of 18 U.S.C. Section 751 arising out of the incident described above.

11. Because this application involves information given by a Confidential Informant, I respectfully request that the Court keep this document sealed until the Court grants its disclosure at the appropriate time.

Subscribed and sworn before me
this 4 day of November, 1994.

/s/ WAYNE KAUFFMANN
WAYNE KAUFFMANN
Deputy U.S. Marshal

/s/ DONALD C. ASHMANSKAS
DONALD C. ASHMANSKAS
U.S. Magistrate

## APPENDIX D

[Defense Counsel's name and address omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

---

Cr. No. 94-379-HA

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

HERNAN RAMIREZ, DEFENDANT

---

**STIPULATION OF FACTS FOR MOTION TO SUPPRESS ON GROUNDS OF ILLEGAL EXECUTION OF SEARCH WARRANT**

With respect only to the defendant's argument that evidence should be suppressed because the warrant was executed in violation of the Fourth Amendment and the federal no-knock statute,[1] the United States of America, through Assistant United States Attorney Stephen F. Peifer, and Hernan Ramirez, through his attorney, Michael R. Levine, hereby stipulate to the following facts:

---

[1] This stipulation is not relevant to defendant's argument that the evidence should be suppressed on the grounds that there was no probable cause to search to the defendant's home for Mr. Shelby. To decide that question, the Court must look only to the facts set forth in the affidavit to the warrant.



In the pre-dawn hours of Saturday, November 5, 1994, Hernan Ramirez, his wife Cynthia, and his three-year-old son Christopher were asleep in the residence at 23170 Bohna Park Road in rural Boring, Oregon. The residence has three bedrooms (including a master bedroom), a living room, kitchen, and an attached garage. A diagram of the property is attached as Exhibit A. This property covers several acres and includes, in addition to the residence, (1) a large work shop building, located about 195 feet south of the main residence (Diagram "E" in Exhibit A); (2) a large travel trailer located about 75 feet west of the workshop (Diagram "F"); (3) a small utility trailer, located about 75 feet from the southwest corner of the residence (Diagram "D"); and (4) a small travel trailer, located immediately adjacent to the east side of the garage (Diagram "C").

At about 6:15 a.m., about 45 armed law enforcement officers converged on the property to execute a federal search warrant for the person of one Alan Lawrence Shelby. A federal and state fugitive, Shelby had slipped from his handcuffs and struck a deputy sheriff to escape while en route to testify on an associate's behalf in Tillamook County. Shelby had a history of escapes, violent conduct, and criminal convictions and had vowed that he would not serve time in a federal prison. Agents obtained information from a person termed a confidential, reliable informant, that indicated that Shelby had been present on the defendant's property. (Further facts contained in the search warrant affidavit, attached to defendant's memorandum in support of his motion to suppress are hereby incorporated into this stipulation). Other information from the same informant indicated that the defendant was possibly involved in drugs, which he kept in the

garage. The informant also indicated there were supposed to be several guns in the garage.

The U.S. Marshal sought authorization from the issuing magistrate to serve the search warrant for Shelby at night and do so without compliance with the knock-and-announce requirement set forth in 18 U.S.C. § 3109. The Marshall prepared the warrant with the appropriate language, and the Magistrate signed it.

Special "SWAT" teams of state, county, and city officers surrounded the property. The Portland Police SWAT team was responsible for clearing and securing the large work shop building, the large travel trailer, and the small utility trailer. The Clackamas County Sheriff's SWAT Team would be responsible for securing the garage area of the residence through the East side window and for securing the travel trailer on the east side of the driveway immediately adjacent to the two car garage (Diagram "C").

Officers Lowe, McCuiston, and Thackson entered the unlocked and empty travel trailer in the driveway. While this was occurring, members of the Portland State SERT team passed the location of the travel trailer to other parts of the property.

Thereafter, Deputy Barnum of the Portland Police broke out the glass of the garage window. While he did so, Sergeant VeraCruz shouted several times, "Sheriff's Office, Search Warrant," at the window. VeraCruz then began to "gunport" the window, that is, aiming and moving his gun through the window ready to shoot if necessary, but he had trouble when the window's curtain got in his way.

At about the same time as this activity at the garage window, an Oregon State Police officer was



talking through a portable loud speaker system located at the front of the house. Sergeant Lowe, while at the garage window, was unable to hear what was being announced by the OSP officer because of VeraCruz's yelling. OSP Lieutenant Geistwhite, however, who was present in front of the house next to Detective Lockwood as Lockwood announced over the loudspeaker:

> State Police—search warrant. Attention inside 23170 SE Bohna Park. This is the State Police. All occupants inside 23170 SE Bohna Park, you are instructed to come out the front door now. Do not resist. Have hands on heads. You will not be harmed.

Inside the residence, Mr. Ramirez and his wife were awakened by outside noises. Neither could determine what the noises were. Mr. Ramirez then heard the breaking of glass, and he and his wife thought they were being burglarized. Both he and his wife feared for their safety and that of their child who had awakened and was crying. After hearing the glass breaking, Mr. Ramirez ran to the laundry room closet, obtained a pistol, and ran to the entrance of the garage area. In a state of panic, Mr. Ramirez fired toward the ceiling in an effort to scare away the intruders. A fragment of metal struck Veracruz in the face causing a slight wound.

The law enforcement officers returned fire and simultaneously shouted "police, police." Realizing, for the first time, that law enforcement officers were outside and trying to enter his residence, Mr. Ramirez ran to the living room, threw away the firearm across the floor, and threw himself on the floor in a prone position, shaking from fright. Mr.

Ramirez states that had he known that the police were trying to enter his home, he never would have fired the weapon. Ultimately, Mr. Ramirez and his wife, who was carrying their child in her arms, walked out of the house and into police custody. Despite a thorough search of the property, the officers did not find Shelby on the premises.

About 6:35 a.m., ATF Agent George Kim interviewed Mr. Ramirez. After advice and waiver of *Miranda* rights, Mr. Ramirez admitted he had fired the weapon, that he owned the gun he used as well as another one in the house, and that he was a convicted felon. He said that he had been awakened by noises outside his house and heard the sound of breaking glass. He said he shot up in the air to scare away people he thought were trying to burglarize his home. Because they were asleep, Mr. Ramirez said, neither he nor his wife had heard any announcement of identity by the officers. Shown a picture of Shelby, Mr. Ramirez said that a man with that appearance might have been present on the property two days earlier.

Mrs. Ramirez also said that she did not know that the police were trying to enter her home and that she believed she was being burglarized and/or attacked by intruders.

Agent Kim used the information furnished by Mr. Ramirez, along with a searching officer's observation of the gun on the living room floor, to obtain another search warrant (attached to the government's memorandum in opposition to defendant's motion to suppress, and hereby incorporated into this stipulation). Executing the second warrant, agents reentered the house later the same day and retrieved



the pistol on the living room floor and a second one in a box as Mr. Ramirez had described.

SO STIPULATED BY THE PARTIES:

/s/ MICHAEL R. LEVINE
MICHAEL R. LEVINE
Attorney for Mr. Ramirez

/s/ _____
A.U.S.A. STEPHEN F. PEIFER
for the Government

DATED: April 20, 1995 DATED: 1/20/95

**APPENDIX E**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

---

No. 95-30158
D.C. No. CR-94-00379-1-ALH

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

*v.*

HERNAN RAMIREZ, DEFENDANT-APPELLEE

---

[Filed: Nov. 15, 1996]

---

**ORDER DENYING PETITION FOR REHEARING AND REJECTING SUGGESTION FOR REHEARING EN BANC**

Before: REINHARDT, KOZINSKI, and FERNANDEZ, Circuit Judges.

The panel has voted to deny the appellant's petition for rehearing and to reject the suggestion for rehearing en banc. Judge Kozinski would grant the petition for rehearing and accept the suggestion for rehearing en banc. Judge Kozinski's dissent is amended to delete the penultimate sentence.

The suggestion for rehearing en banc was circulated to the judges of the court, and no judge requested a vote for en banc consideration.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

(3)

9

Supreme Court, U.S.
FILED
MAY 16 1997
CLERK

No. 96-1469

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1996

UNITED STATES OF AMERICA,

Petitioner,

v.

HERNAN RAMIREZ,

Respondent.

MOTION FOR LEAVE

TO PROCEED IN FORMA PAUPERIS

The Respondent, Hernan Ramirez, requests leave to file the attached Respondent's Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of costs and to proceed in forma pauperis pursuant to Rule 39.1 of this Court and 18 U.S.C. §3006A(d)(6). The Respondent was represented by counsel appointed under the Criminal Justice Act in the District of Oregon and on appeal in the Ninth Circuit Court of Appeals.

RESPECTFULLY SUBMITTED this 16th day of May, 1997.

Michael R. Levine
Attorney for Petitioner

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No. 96-1469

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1996

UNITED STATES OF AMERICA,

Petitioner,

v.

HERNAN RAMIREZ,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO

PETITION FOR WRIT OF CERTIORARI

Michael R. Levine
Assistant Federal Public Defender
101 S.W. Main Street, Suite 1700
Portland, Oregon 97204
(503) 326-2123
Attorney for Respondent

## QUESTION PRESENTED

Whether the two reviewing courts that found the officers' predawn forced intrusion into a sleeping family's residence unreasonable under 18 U.S.C. Section 3109 correctly determined that, under the totality of the circumstances, more specific evidence of danger is required where the officers entered by damaging the homeowner's property than if they did not.

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## I. STATEMENT OF THE CASE

**A. Stipulated Facts.**

The government's statement of the case omits the following important facts to which the parties stipulated in the District Court. (Pet. App. D, 42a-47a):

1. When Mr. and Mrs. Ramirez heard the breaking of glass, they thought they were being burglarized, and "they feared for their safety and that of their child who had awakened and was crying." (Pet. App. D, 45a).

2. After hearing the shattering of the garage window, Mr. Ramirez ran to a closet, obtained a pistol, and ran to the entrance of the garage where,"in a state of panic," he fired toward the ceiling "in an effort to scare away the intruders." A fragment of metal struck one of the officers in the face causing a slight wound. *Id.*

3. The law enforcement officers returned fire and simultaneously shouted "police, police." "Realizing, for the first time," that the intruders were police, Mr. Ramirez ran to the living room, threw away the firearm across the floor, and threw himself down on the floor in a prone position, "shaking from fright." *Id.*

4. Mr. Ramirez stated that "had he known that the police were trying to enter his home, he never would have fired the weapon." (Pet. App. D, 46a). Ultimately, Mr. Ramirez and his wife, who was carrying their three-year-old child in her arms, walked out of the house into police custody. *Id.*

5. "Despite a thorough search of the property, the officers did not find Shelby on the premises." (Pet. App. D, 46a).



6. During a post-arrest interview, Mr. and Mrs. Ramirez said they had not heard any announcement by the police because they were asleep. They were awakened by the shattering of glass and by other noises. *Id.* Mrs. Ramirez told officers that she did not know that the police were trying to enter her home and that "she believed that she was being burglarized and/or attacked by intruders." *Id.*

7. After one of the officers broke the garage window, he thrust his firearm through the window and waved it about "ready to shoot if necessary, but he had trouble with this maneuver when the window's curtain got in his way." (Pet. App. D, 44a).

The government's statement also contains the following errors:

1. Shelby escaped from custody on November 1, 1994 (*see* Affidavit of Deputy Marshal Kauffman, Pet. 37a ¶ 2), not on November 2. (Pet. 3).

2. Contrary to the government's statement, Mr. Ramirez did not tell the agents after his arrest that a man resembling Shelby "had been" at his house two days earlier (Pet. 5); he told them only that such a person "might have been" on his property two days earlier (Pet. App. D, 46a).

Except for the above-mentioned errors and omissions, Mr. Ramirez accepts the government's statement of facts.

**B. The Decision Of The District Court.**

The District Court rejected Mr. Ramirez's argument that the warrant was not based on probable cause, but granted his motion to suppress the firearms because the officers violated 18 U.S.C. § 3109 and the Fourth Amendment. The court relied on the Ninth Circuit's long-standing test for exigent circumstances restated in *United States v. Becker*, 23 F.3d 1537, 1540-41 (9th Cir.

1994). Following *Becker*'s reasoning, the District Court acknowledged that "mild exigency," such as knowledge that a person is dangerous, can justify immediate entry into a residence that is done without destruction of property. (Pet. 32a). To justify destruction of property, however, "more specific inferences of exigency are necessary." *Id.*

Applying the approach in *Becker*, the District Court found that although there were specific facts regarding Shelby's propensity to attempt escape, his disdain for federal incarceration, and his past willingness to use threats and violence as means of intimidation, "there was no information that he was armed and dangerous at defendant's home, or that he would present any specific dangers to arresting officers if found there." (Pet. 34a). The District Court concluded that there were

> insufficient exigent circumstances to establish that Shelby presented such a threat to the force deployed to apprehend him the early morning of 5 November as to justify abandoning the "simple and ancient requirement that the officers ought to signify the cause of their coming, and to make request to open doors" before destroying property during a governmental intrusion into a person's home.

(Pet. 34a, citations omitted).

**C. The Decision Of The Court Of Appeals.**

The Court of Appeals affirmed the District Court in a 2-1 opinion. The majority began its analysis by observing that "nowhere is the protective force of the fourth amendment more powerful than when the sanctity of the home is involved." (Pet. 5a, citations omitted). Citing *Becker*, the Court observed that the Fourth Amendment helps protect "our homes--the centers of our family life and our refuge from the rude world." (Pet. 5a). The Court explained further that the Amendment protects the "privacy, the safety, and the property" of our citizens. (Pet. 6a).



Turning to the knock-and-announce principle, the Court noted that in *Wilson v. Arkansas*, 115 S. Ct. 1914 (1995), this Court concluded that the principle "was woven quickly into the fabric of early American law" and that, as a matter of constitutional law, "the method of an officer's entry into a dwelling" was among the factors to be considered in assessing the reasonableness of a search and seizure. (Pet. 6a-7a, quoting *Wilson*, 115 S. Ct. at 1917-18).

The appellate court then observed that the common law tradition finds expression in the federal knock-and-announce statute, 18 U.S.C. § 3109, which allows an officer to break open a door or window of a house to execute a warrant "if, after notice of his authority and purpose," he is refused admittance. "We insist upon this notice," said the Court of Appeals, "because, as individuals, we fear for our privacy in the face of government might, and we fear for our property and our safety as well." (Pet. 7a). The Court reiterated that "the fear of a smashing in of doors by government agents is based upon much more than a concern that our privacy will be disturbed. It is based upon concern for our safety and the safety of our families...." *Id.* (quoting *Becker*, 23 F.3d at 1540).

Citing this Court's admonition in *Sabbath v. United States*, 391 U.S. 585, 589 (1968), the Court of Appeals explained that "we also fear the needless injuries that might be inflicted upon police officers, or upon a homeowner, as a result of the homeowner's mistaken belief that miscreants are invading his little castle." (Pet. 7a). Such a mistaken belief occurred here, said the Court, a mistake that almost ended in tragedy:

> Had Ramirez been less reasonable, the officer at the window might have been killed; had Ramirez been less wise, he or his family might have been killed. As it was, his property was needlessly damaged when his home was broken into.

(Pet. 8a). The Court of Appeals said this near-tragedy occurred because, when the officers executed the warrant, "they brushed aside the wisdom of history and elicited a response which, if not strictly intended, should have been reasonably foreseen." *Id.* Elaborating, the Court asked rhetorically, "what could they have expected when they broke into the home of a sleeping family in the early hours of the morning?" (Pet. 14a). Ramirez "fired a gun at the ceiling of his own home when unknown intruders were invading it." (Pet. 16a).

The Court of Appeals readily agreed that exigent circumstances could justify breaking into a house without notice, but noted that "mere incantation of that phrase" was not sufficient. It was the Court's responsibility to determine "what kind of exigency it was." (Pet. 8a). The Court noted that in the case at bar, "an officer broke into the home through a window and was ready to fire the weapon if he deemed it necessary to do so." Citing *Becker,* the Court said that more than a mild exigency was needed and that to justify physical destruction of property "more specific inferences of exigency are necessary." (Pet. 8a, quoting *Becker*, 23 F.3d at 1541).

In determining the kind of exigency that existed, the Court of Appeals reasoned that the forty-five armed officers did not fear any of the actual residents of the house and were not attacking a gang or cult hangout "where they might be met by a fusillade of gunfire." (Pet. 8a). They were concerned about one person, Shelby, who "might" be on the premises, but Shelby was "not known to have ever shot or shot at anyone." *Id.* The Court explained that "there [was] no suggestion that the police presence was known, no confirmation that Shelby was on the premises and, more importantly, no indication that Shelby was armed and would resist with deadly force." (Pet. 10a-11a). The Court reiterated that the officers "did not know that Shelby had a gun, nor that he had access to one, nor that he would consider using one against them." (Pet. 11a).



After a thorough review of the Circuit's cases, the Court of Appeals concluded by observing that its review was "necessarily fact bound." (Pet. 11a). Acknowledging that police "must have some leeway in balancing the demand of the knock-and-announce requirement against other safety considerations," the Court said that it was the Court's duty to determine "whether the police struck that balance properly." The Court concluded by holding that the officers' entry violated both Section 3109 and the Fourth Amendment. (Pet.17a).

The dissenting judge disagreed with the majority's result and claimed it was inconsistent with other cases in the Circuit. However, he never attacked the soundness of the approach set forth in *Becker;* nor did he assert that the approach conflicted with that employed in any other Circuit.

## II. REASONS FOR DENYING CERTIORARI

### A. Certiorari Should Be Denied And The Court Should Decline To Hear The Government's Challenge To The Ninth Circuit's Approach Because The Government Embraced This Approach In The District Court And Attacked It Only After Losing In The Court of Appeals.

The government challenges the test used by the Ninth Circuit to determine whether exigent circumstances justify an officer's failure to comply with the knock-and-announce requirements set forth in 18 U.S.C. § 3109 and embodied in the Fourth Amendment. For each of the three reasons set forth below, the government has waived this challenge.

#### 1. The Government's Embrace of the Test in the District Court Constitutes a Waiver.

In the District Court, the government did not challenge the Ninth Circuit's approach about which it now complains. On the contrary, the government relied upon the approach to support its view that exigent circumstances justified dispensing with the knock-and-announce requirement.

(Gov. Mem., Lodged Doc. A).[1] Indeed, in oral argument before the District Court, the government praised *Becker,* which had recently applied the test, as "*very useful for the court . . . in stating the standard which in this case must be specific inferences of exigency.*" (Tr. Oral Arg. 4/25/95 at 21, Lodged Doc. B, emphasis added). The government's embrace in the District Court of the very test it now challenges here constitutes a forfeiture or waiver of the argument. *See e.g., Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 893 (1991) (Scalia, J., concurring) ("a party forfeits the right to advance on appeal a nonjurisdictional claim, structural or otherwise, that he fails to raise at trial"); *United States v. Ortiz*, 422 U.S. 891, 898 (1975) (where government said below it was satisfied with the governing case, the Court "decline[s] to consider this issue, which was raised for the first time in the petition for certiorari").

2. **The Government's Failure to Attack the Test in the Court of Appeals Until a Petition for Rehearing Constitutes a Waiver.**

Similarly, in the Court of Appeals, the government never questioned the appropriateness of the Circuit's long-standing test, but argued only that the District Court had misapplied it. (Gov. Briefs, Lodged Docs. C & D). Only after the Ninth Circuit affirmed the District Court, did the government attack the test for the first time in its petition for rehearing and suggestion for rehearing *en banc*. (Pet. Reh'g, Lodged Doc. E).

Playing the game by the rules, losing the game, then complaining about the rules is classic sandbagging. *Cf. Freytag,* 501 U.S. at 895 (Scalia, J., concurring) ("sandbagging" is the practice of "suggesting or permitting, for strategic reasons, the trial court to pursue a certain course, and later–if the outcome is unfavorable–claiming that the course followed was reversible error"). By

[1]Mr. Ramirez has lodged documents A-G with the Clerk of Court.



waiting until a petition for rehearing to challenge the Ninth Circuit's approach that it embraced both in the District Court and in the Court of Appeals, the government clearly waived the argument in the Court of Appeals. *Boardman v. Estelle*, 957 F.2d 1523, 1534 (9th Cir.), *cert. denied*, 506 U.S. 904 (1992); *see United States v. Quiroz*, 22 F.3d 489, 490-91 (2nd Cir. 1994) (same).

For the same reason, the government has waived the argument in this Court because the Court ordinarily "does not decide questions not raised or resolved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234(1976); *see United States v. Alvarez-Sanchez*, 511 U.S. 350, 360 n.5 (1994) (respondent's Fourth Amendment claim waived when not raised below and where no exceptional circumstances); *Steagald v. United States*, 451 U.S. 204, 209-10 (1981) (government loses right to contest standing when it failed to raise issue in the lower court). Waiver or forfeiture is particularly appropriate here where the government's conduct is tantamount to invited error. *Cf. United States v. Wells*, 117 S.Ct. 921, 925 (1997) (under the "invited error" doctrine a party may not complain of errors that he himself invited or provoked in the District Court unless "pressed in or passed on" by the Court of Appeals).

3. **The Government's Failure to Present Its Primary Argument At Any Time In the Court of Appeals Constitutes a Waiver.**

In this Court, the government argues for the first time that the Ninth Circuit's test erroneously makes property damage the determinant of how specifically officers must be able to infer a risk of danger before they may make a no-knock entry (Pet. 9), and that the need to damage property in making an unannounced entry "has no bearing on whether...law enforcement interests are present." (Pet.12). The government never raised this argument in the Court of

Appeals even in its petition for rehearing where it argued only that the District Court erred in according "dispositive significance" to property damage. (Lodged Doc. E at 12). The proper test, the government argued below, should consider property damage but only "as a single factor in the 'reasonableness' balancing test required by the Supreme Court's decision" in *Wilson v. Arkansas*, 115 S. Ct. 1914 (1995). (Doc. E at 12-13).

The government's failure to present to the Ninth Circuit the argument it raises here constitutes a waiver. *See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 39 (1989) (argument waived because "respondent's present defense of the judgment, however, is not one he advanced below"); *Alvarez-Sanchez*, 511 U.S. at 360 n.5; *Steagald*, 451 U.S. at 209-210.

In sum, it is often the government which is quick to argue that petitioners have waived or forfeited issues and arguments by not raising them below. *See e.g.*, Gov. Brief in *United States v. Olano*, 507 U.S. 725 (1993), at 1992 WL 511970. The government having waived its argument here, the Court should deny the government's petition.

**B. Certiorari Should Be Denied Because The Decision Below Follows Longstanding Precedent And Does Not Create An Intercircuit Conflict.**

Conceding that the Ninth Circuit's approach has been a "long standing rule" in the Circuit (Pet. 11), the government nevertheless claims that the approach conflicts with that employed in the other Circuits. (Pet. 10). The government's argument is wrong; there is no conflict. The government fails to cite a single case that has ever even questioned the Ninth Circuit's approach, much less rejected it.

The Ninth Circuit's approach was apparently first enunciated twenty-four years ago in *United States v. Bustamante-Gamez*, 488 F.2d 4 (9th Cir. 1973), *cert. denied*, 416 U.S. 970



(1974). The approach was reaffirmed by the Court *en banc* in *United States v. McConney*, 728 F.2d 1195 (9th Cir.), *cert. denied*, 416 U.S. 970 (1984). *McConney* defines exigent circumstances as:

> those circumstances that would cause a reasonable person to believe that entry (or other relevant prompt action) was necessary to prevent physical harm to the officers or other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts.

*McConney*, 728 F.2d at 1195.

In distinguishing between the kinds of exigency, the Court states as follows:

> mild exigency is sufficient to justify simultaneous entry when entry can be accomplished without physical destruction of property. *United States v. Bustamente-Gamez*, 488 F.2d 4, 11 (9th Cir. 1973). Mild exigency may exist where there is a likelihood that the occupants will try to escape, resist, or destroy evidence. More specific inferences of exigency are necessary if entry may be obtained only by the physical destruction of property.

*Id.*, 728 F.2d at 1206 (some citations omitted).

Cases in many Circuits cite various propositions in *Bustamante-Gamez* and *McConney* with approval, and none question the reasoning of either case.[2] Tellingly, the dissenting judge below, in his lengthy and vigorous opinion, nowhere asserts that the approach taken by the majority conflicts with that employed in any other Circuit. In fact, he cites *Bustamante-Gamez* himself for the proposition that the knock-and-announce requirement is not inflexible. (Pet. 24a).

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[2]*See United States v. Brown*, 52 F.3d 415 (2d Cir. 1995) (citing *Bustamante-Gamez* for the purposes underlying the knock-and-announce rule including prevention of "needless destruction of property"), *cert. denied*, 116 S.Ct. at 754 (1996); *United States v. Kemp*, 12 F.3d 1140, 1142 (D.C. Cir. 1994) (same); *United States v. Kane*, 637 F.2d 974 (3rd Cir. 1991) (citing case for propositions that Section 3109 "reduces the potential for violence to both the police officers and the occupants of the house" and prevents damage to private property that may be needlessly destroyed in a forced entry).

Furthermore the approach of the Ninth Circuit is fully consistent with this Court's precedents interpreting 18 U.S.C. § 3109. *See Miller v. United States*, 357 U.S. 301, 306-07 (1958) (knock-and-announce requirements contained in Section 3109 are "deeply rooted in our heritage and should not be given a grudging application"); *Sabbath v. United States*, 391 U.S. at 589 (same).

The government asserts that "[i]n no other circuit" does it face an increased burden to justify a no-knock entry "simply because property damage occurred in the course of the entry." (Pet. 10). This is incorrect. It is true that other Circuits do not use the precise "mild exigency" language that the Ninth Circuit employs. The government cites no case, however, suggesting that in determining the objective reasonableness of the officers' decision to make an unannounced entry, the reviewing court may not require more specific evidence of exigency to justify damage to property. Indeed, the cases that have discussed the issue suggest the contrary. *See United States v. Stewart*, 867 F.2d 581, 584 (10th Cir. 1989) ("the conclusion of exigency under these facts must be *especially clear ...where the destruction of physical property took place"); United States v. Brown*, 52 F.3d 415, 421 (2d Cir. 1995) (one of the "touchstones for determining the existence of exigent circumstances...[is] the peaceful circumstances of the entry"), *cert. denied*, 116 S. Ct. at 754 (1996); *Dorman v. United States*, 435 F.2d 385, 393 (D.C. Cir. 1970) (reasonableness of warrantless, unannounced entry into home to look for fugitive, depends partly on whether entry made "peaceably"); *King v. Marmon*, 793 F. Supp. 1030, 1033 (D. Kansas 1992) ("courts have found that only a mild indication of exigency is required...if no physical damage to the premises is necessary to enter, although more specific inferences of exigency are necessary when physical disruption of property is required").



Several state cases apply the same test. In *State v. Ogden*, 161 Vt. 336, 640 A.2d 6 (1993), the court affirmed a no-knock entry primarily on the ground that there was no destruction of property. The court said "where the police have knocked and announced their identity and purpose, an exigency may justify immediate entry if that entry can be accomplished without physical destruction of property." 161 Vt. at 340, 640 A.2d at 9-10 (citing *McConney*, 728 F.2d at 1206); *see Trosper v. State of Alaska*, 721 P.2d 134, 135 (1986) (citing *Bustamante-Gamez*, court holds that where there was no destruction of property only a "mild" exigency was required to excuse noncompliance with the knock-and-announce principle).

The cases the government cites in support of its argument that a conflict exists are fully consistent with the approach employed by the Ninth Circuit. Although these cases do not focus on property damage, such focus was unnecessary given the very strong showing of inferences of danger in virtually every case. *See United States v. Stowe*, 100 F.3d 494, 499 (7th Cir. 1996) (defendant seen night before with large amount of crack and two loaded guns, had criminal record and alias, and residence had steel doors), *cert. denied*, 1997 WL 27218 (April 14, 1997); *United States v. Dahlman*, 13 F.3d 1391, 1394 n.3, 1398 (10th Cir. 1993) (defendant said he intended to "shoot it out" with police rather than be arrested, had reached for gun during earlier arrest, and was alerted to police presence by barking guard dog), *cert. denied*, 511 U.S. 1045 (1994); *United States v. Kennedy*, 32 F.3d 876, 882-83 (4th Cir. 1994) (defendant was narcotics trafficker in midst of deal with others with prior firearms convictions who were probably armed and had told friend that if he was arrested it would be for "killing a cop"), *cert. denied*, 115 S. Ct. 939 (1995); *United States v. Lalor*, 996 F.2d 1578 (4th Cir.) (defendant arrested with a firearm and drugs six

days earlier, had been "belligerent" and had made "derogatory remarks" about the police, and was cocaine dealer), *cert. denied*, 510 U.S. 983 (1993).

The government's insistence that in the other Circuits damage to property is irrelevant to the question of the reasonableness of a failure to comply with Section 3109 is puzzling in view of this Court's statement in *Wilson* that as a matter of constitutional law, "the method of an officer's entry into a dwelling" was among the factors to be considered in assessing the reasonableness of a search and seizure. 115 S. Ct. at 1917-18. It is also puzzling given the government's concession that "one of the interests that underlie the knock-and-announce principle is the avoidance of damage to property." (Pet. 10, citing *Wilson*,115 S. Ct. at 1918-19 ); *see Richards v. Wisconsin*, 117 S. Ct. 1416, 1421 n.5 (1997) (interest in avoiding property damage "not inconsequential"). In fact, the ancient common law rule was justified in part by the belief that announcement generally would avoid the "*destruction or breaking of any house...by which great damage and inconvenience might ensue.*" *Wilson*, 115 S. Ct. at 1917-1918 (quoting *Semayne's Case*, 5 Co. Rep. 91a, 91b, 91b, 77 Eng.Rep. 194, 196 (K.B. 1603) (emphasis added).

In any event, every Circuit agrees that prevention of damage to property is one of the three fundamental interests safeguarded by Section 3109. The Sixth Circuit summarized the law as follows:

> As recognized by other Circuits addressing this issue, the interests protected by § 3109 include: (1) the reduction of potential for violence to both the police officer and the occupants of the house into which entry is sought; (2) *the needless destruction of private property*; and (3) a recognition of the individual's right to privacy in his [or her] house.

*United States v. Bates*, 84 F.3d 790, 794 (6th Cir. 1996) (emphasis added); *see Bonner v. Anderson*, 81 F.3d 472, 474 (4th Cir. 1996) (same); *United States v. Kemp*, 12 F.3d 1140, 1142



(D.C. Cir. 1994) (same); *United States v. Brown*, 52 F.3d 415, 421 (2d Cir.1995) (the three interests "are not debatable"), *cert. denied*, 116 S. Ct. 754 (1996); *United States v. Ruminer*, 786 F.2d 381, 383 (10th Cir. 1986); *see generally* 2 Wayne R. LaFave, *Search and Seizure* § 4.8(a) at 599 (3d ed. 1996) ("preventing the physical destruction of property" is one of the three "most worthwhile" goals underlying the rule).

At most, the approach taken by the various Circuits differs from that taken by the Ninth Circuit only in language or in emphasis. There is clearly no conflict of the kind that warrants a grant of certiorari. *Cf. United States v. Lorenzetti*, 467 U.S. 167, 173 (1984) (where one Circuit's interpretation of a statute was "squarely inconsistent" with another's, certiorari was granted). Even if there were a conflict, the Court should not grant certiorari until the conflict is more fully developed by the Circuit Courts. This is particularly true now that the Court has reviewed two knock-and-announce cases within a short time: *Richards v. Wisconsin* and *Wilson v. Arkansas*. The Court should wait until the Circuits have worked out the various ramifications of these new cases. *See McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J.) (certiorari denied where issues require "further study" in lower courts "before it is addressed by this Court").

### C. Certiorari Should Be Denied Because The Decision Below Is Not Sufficiently Important to Warrant Review.

As far as Mr. Ramirez is aware, until its petition for rehearing *en banc* in the instant case, the government never before challenged the Ninth Circuit's approach. On the contrary, for the

last twenty-four years, the government has constantly relied upon it to argue that no-knock entries should be upheld. Indeed, in those cases the government has almost always been successful.[3]

The government's past practice of embracing the approach it now attacks strongly suggests that the government is simply unhappy with the result reached below. It is well settled, however, that even if the decision below were incorrect, the Court does not grant certiorari merely to correct an erroneous result.[4] Therefore, the government's petition should be denied.

**D. Certiorari Should Be Denied Because The Result Below Is Correct For Reasons Independent Of The Issue Raised In The Petition.**

The judgment below may be defended "on any ground which the law and the record permit." *Smith v. Phillips*, 455 U.S. 209, 215 n. 6 (1982); *see Schenck v. Pro-Choice Network of Western New York*, 117 S. Ct. 855, 870 n.12 (1997) (citing cases). In the instant case, there are three such grounds: (1) there was no probable cause to issue the warrant; (2) the warrant was

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[3]*See, e.g., United States v. Hudson*, 100 F.3d 1409 (9th Cir. 1996); *United States v. Scott*, 74 F.3d 175 (9th Cir. 1996); *United States v. Perez*, 67 F.3d 1371 (9th Cir. 1995); *United States v. Von Willie*, 59 F.3d 922 (9th Cir. 1995); *United States v. Reed*, 15 F.3d 928 (9th Cir. 1994); *United States v. Ramirez*, 770 F.2d 1458, 1461 (9th Cir.1985); *United States v. Turner*, 926 F.2d 883 (9th Cir.), *cert denied*, 502 U.S. 830 (1991); *United States v. Arias*, 923 F.2d 1387, 1391 (9th Cir.), *cert. denied* (1991); *United States v. Bustamante-Gamez*, 488 F.2d 4 (9th Cir. 1973), *cert denied*, 416 U.S. 970 (1974); *United States v. McConney*, 728 F.2d 1195 (9th Cir.) (*en banc*), *cert. denied*, 469 U.S. 824 (1984); *United States v. Scott*, 520 F.2d 697, 700-01 (9th Cir. 1975); *United States v. McShane*, 462 F.2d 5 (9th Cir. 1972); *Gilbert v. United States*, 366 F.2d 923 (9th Cir. 1966).

[4]As Chief Justice Rehnquist has admonished, "we must never forget that this Court is not a forum for the correction of errors." *Boag v. MacDougall*, 454 U.S. 364, 367 (1982) (Rehnquist, C.J., dissenting); *see Watt v. Alaska*, 451 U.S. 259, 275 n.5 (1981) (Stevens, J., concurring) (certiorari jurisdiction is "designed to serve purposes broader than the correction of error in particular cases").



void because the magistrate lacked jurisdiction to issue a "no-knock" warrant; and (3) Section 3109 contains no exception for danger to the officer.

**1. <u>There Was No Probable Cause To Issue The Warrant</u>.**

The result below is correct because, contrary to the conclusion of the District Court, there was no probable cause to believe that Shelby was spending nights in the Ramirez home at all, much less the nights of November 4 and 5. The Ninth Circuit said there "may well be some doubt" about this matter, but did not decide the issue; it assumed probable cause existed. (Pet. 12a n. 1).

The affidavit in support of the application for the warrant does not establish probable cause to believe that Shelby was sleeping at the residence. At most, the affidavit establishes that a man resembling Shelby had been seen during the day of November 2 or 3 working "outside the residence washing a car." (Pet. 40a ¶ 6). When Deputy U.S. Marshal Kauffman went to the property, he could only see someone whom he believed looked like Shelby. Even this tentative identification was questionable at best because it was made from a distance of "approximately 1000 yards" (Pet. 40a), well over one-half a mile. According to the Court of Appeals, "the most that was known" was that Shelby was on the property "two or three days earlier." (Pet. 12a n.1). The high probability was that Shelby, if he had been at the residence at all, was simply working there during the daytime for one or two days. After all, he was a fugitive, and of necessity on the run. This showing did not establish probable cause to believe Shelby was in the residence during the predawn hours of November 5.

Furthermore, before shattering a window and forcing entry into a family residence in predawn hours without the requisite announcement, the officers should have more than the bare

minimum of probable cause to believe the fugitive is in the residence; they should have a "strong reason" to believe that the suspect is there. *See Brown*, 52 F.3d at 415; *Dorman v. United States*, 435 F.2d 385, 393 (D.C. Cir. 1970).

In sum, the Court below correctly affirmed the District Court's suppression of the evidence, and certiorari should be denied.[5]

**2. The Warrant Was Void Ab Initio Because the Magistrate Had No Jurisdiction to Issue a "No-Knock" Warrant.**

The result below is correct because the magistrate lacked authority to issue a "no-knock" warrant; therefore, the warrant was void *ab initio*. *Cf. Gomez v. United States*, 490 U.S. 858, 876 (1989) (where Congress did not authorize a magistrate to select a jury over objection, the conviction is void regardless of lack of prejudice); *Bingman v. Ward*, 100 F.3d 653, 658 (9th Cir. 1996) (because magistrate may not "undertake the exercise of an authority which Congress has expressly withheld," contempt order vacated), *cert. denied*, 117 S. Ct. 1473 (1997).

In the District Court and in the Court of Appeals, the government argued that the officers' belief in the existence of exigent circumstances was reasonable in light of the magistrate's having issued a "no-knock" warrant. (Lodged Doc. A at 11; Doc. C at 13). This warrant authorized the officers to dispense with the knock-and-announce requirement when executing the warrant. (Lodged Doc. F). Not surprisingly, the government does not renew that argument here. The government no doubt realizes that it failed to advise the magistrate that he had no authority to

[5]The government cannot rely on the good faith exception to the warrant requirement recognized in *United States v. Leon*, 468 U.S. 897 (1984), because the government did not act in good faith in applying for a "no-knock" warrant, which the government knew was not authorized by law. *See* Part D2, *infra*.



issue a "no-knock" warrant. Neither Rule 41 of the Federal Rules of Criminal Procedure, which governs the issuance of search warrants, nor any other federal rule or statute authorizes such warrants. In fact, Congress repealed any authority for such warrants.

In 1970, Congress enacted legislation authorizing the issuance of "no-knock" warrants in drug cases when the magistrate found probable cause to believe that, if notice were given, the safety of the executing officer would be endangered or the destruction of evidence would occur. *See* Section 509(b) of the Drug Abuse Prevention and Control Act of 1970, Pub.L. 91-513, 84 Stat. 1236, 1274 (codified at 21 U.S.C. § 879(b) (1970) (repealed)). Barely four years later, however, Congress repealed the law. *See* Section 3 of Pub.L. 93-481, 88 Stat. 1455, 1455-56 (1974). According to one court, repeal was so quick because "Congress discovered" that no-knock warrants created a "staggering potential for violence to both occupants and police." *State v. Bamber*, 630 So.2d 1048, 1058 (Fla. 1994).

Indeed, during the four-year period when no-knock warrants were issued, "horror stories were legion." *Bamber*, 630 So.2d at 1051 (quoting Garcia, *The Knock and Announce Rule: A New Approach to the Destruction of Evidence Exception*, 93 Colum. L. Rev. 685 (1993)).

> Over 100 newspaper articles reproduced in the Congressional Record, described a repeated scenario: terrified citizens, thinking themselves targets of burglary or more frightening acts, discovered that they were instead being searched by law enforcement officers who had entered their home without notice. In an exhaustive eight-week investigation by The New York Times, consisting of interviews with victims of "no-knock" raids, reporters found that innocent Americans around the country have been subject to dozens of mistaken, violent and often illegal police raids by local, state and federal narcotics agents in search of illicit drugs and their dealers.

*Bamber* at 1051 (quoting *Garcia* at 705 ); *see* 120 Cong. Rec. 22,886-88 (1974) (N.Y. Times Article); 120 Cong. Rec. 26,874 (1974) (Wall St. J. Article); 119 Cong. Rec. 15,170-76 (1973) (numerous articles and letters to Senator Ervin); 119 Cong. Rec. 23, 242-58 (1973).

Prepatory to the passage of the repealing legislation, House and Senate Committees extensively documented the abuses brought about by four years of "no-knock" warrants. The House Committee noted, for example, "several instances in which Department of Justice enforcement agents in their eagerness to crush illicit drug trafficking have mistakenly broken into the homes and apartments of dozens of innocent families, terrorizing the occupants and heavily damaging property." H. Report 93-1248, at 6, 8. The Committee also determined that law enforcement agencies were showing "a lack of discretion and attention to alternative methods of securing evidence on the part of the Department of Justice." *Id.* at 8; 120 Cong. Rec. 26,781 (1974). In 1974, the Senate voted to repeal the no-knock statute by a 2 to1 margin. *Garcia*, *supra* at 703.

Thus, the empirical evidence showed that rather than reducing violence, no-knock warrants did the opposite: they "had in several instances resulted in serious injury and death of law enforcement officers and civilians." H. Report 93-1248 at 8; 120 Cong. Rec. 26,781 (1974). As concisely put by Senator Sam Ervin,

> I know of no provision of law which puts officers of the law in more jeopardy of life and limb than..."no-knock" searches of the homes of our citizens. *When someone attempts to break into the dwelling house of the average citizen in the night time, the average citizen is not going to wait to ascertain whether it is an officer of the law or whether it is a burglar. He is going to resist to the utmost, even to the taking of lives....*It is ridiculous to say that breaking in without notice serves as protection for the police officer. The contrary is true. He is more likely to lose his life if he attempts to break in without notice.



120 Cong. Rec. 22,884 (1974) (emphasis added); *see also* Remarks of Representative Tim Lee Carter, 120 Cong. Rec. 26,781 (1974) ("In the area which I come from, if a man knocks the door down and goes in [without notice], he usually comes out feet first and the undertaker takes care of him. A man's house is his castle").

Unfortunately, even today, noncompliance with the knock-and-announce rule continues to cause needless death and tragedy among both police officers and civilians alike. Lodged with the Court (Doc. G) are several newspaper articles describing needless tragedies that have occurred in recent years, four of which are summarized below.[6]

Without referring either to the federal experience with "no-knock" warrants, or to the contemporary accounts of tragedies, this Court recently suggested in *obiter dictum* that the practice of some state courts to issue such warrants was "entirely reasonable" under some

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[6](1) The shooting of Juan Rocha-Gallegos seven times during a no-knock drug raid. Rocha-Gallegos said he was awakened by the sound of the locks of his house being shot off, then jumped out of bed when six people burst through the door and shined flashlights on him. He was shot in the chest, arms, and legs. (Denver Post, April 3, 1996, 1996 WL 6689450); (2) the death of Accelyne Williams, a 75 year-old reverend, who died from a heart attack after a heavily armed team of 13 officers, using a no-knock warrant, mistakenly burst into his second-floor apartment, chased him to the bedroom, and wrestled him to the floor. The police later admitted that they had barged into the wrong apartment. (The Boston Globe, January 27, 1995, 1995 WL 5924468); (3) the near-fatal shooting of Donald L. Carlson, a Fortune 500 company executive, whose home was broken into by a heavily armed force of federal agents looking for drugs. Aroused from a deep sleep, Carlson wounded an officer as he fired in self-defense at persons he perceived to be criminal intruders; he was himself wounded three times. No drugs were found. (San Diego Union-Tribune, December 13, 1992, 1992 WL 4766590); (4) the death of multimillionaire Donald Scott during a no-knock raid on his Malibu ranch by police looking for drugs. None were found. Roused by his wife's cries, after the task force burst into his home, and partially blinded by a cataract operation, the 61-year-old Scott rushed into the living room holding a revolver above his head. The police said that instead of dropping the weapon as ordered, Scott lowered it in the officers' direction. Scott was shot twice in the chest and died. (San Francisco Chronicle, November 2, 1992, 1992 WL 6287829).

circumstances. *Richards*, 117 S. Ct. at 1422 n.7. Clearly, by repealing the federal no-knock law, Congress reached the opposite conclusion, and, at least with respect to Section 3109 and the federal courts, unequivocally rejected the reasonableness of no-knock warrants.

In sum, the warrant issued in the instant case was void, and by affirming the suppression of evidence, the court below reached the correct result. Therefore, certiorari should be denied. Certiorari should also be denied because, by requesting the magistrate to issue a "no-knock" warrant, the government asked the magistrate to perform an unlawful act, and the magistrate did so. The Court should not reward the government's conduct by granting the government's petition here.

### 3. Section 3109 Provides No Exception For Danger To The Officers Executing the Warrant.

The result below is correct because Section 3109 contains no exception for danger to the officers executing the warrant. In enacting the statute, Congress balanced the interests and determined that compliance with Section 3109 best safeguards the safety of both officers and civilians. As stated by one court, "Congress could reasonably have concluded that a directive such as Section 3109 would enhance the safety of law enforcement officials." *United States v. Nolan*, 718 F.2d 589, 596 n.10 (3rd Cir. 1983); *see United States v. Pratter*, 465 F.2d 227, 233 n.16 (7th Cir. 1972) ("strict compliance with the statute is a protection to the safety of the arresting officers and to the effective accomplishment of their mission.").

Mr. Ramirez acknowledges that the knock-and-announce requirement *embodied in the Fourth Amendment* can "give way under circumstances presenting a threat of physical violence."



*Richards v. Wisconsin*, 117 S. Ct. at 1420 (quoting *Wilson*, 514 U.S. at 936). This exception is in addition to three others that have been previously recognized:

> (1) where the persons within already know of the officers' authority and purpose, or (2) where the officers are justified in the belief that persons within are in imminent peril of bodily harm, or (3) where those within, made aware of the presence of someone outside (because, for example, there has been a knock at the door), are then engaged in activity which justifies the officers in the belief that an escape or the destruction of evidence is being attempted.

*Ker v. California*, 374 U.S. 23, 47 (1963) (Brennan, J., concurring and dissenting).

Importantly, while "danger to the officer" is an exception under the Fourth Amendment, this Court has never held it is also an exception under Section 3109. *See Sabbath*, 391 U.S. at 591 (not necessary to decide the issue because facts do not show officer at risk); *Miller v. United States*, 357 U.S. at 309 (court need not decide whether Section 3109 permits any exceptions for exigent circumstances because necessary facts not present).

Mr. Ramirez also acknowledges that the Circuits reaching the issue, including the Ninth, hold that compliance with the requirements of Section 3109 may be excused if the safety of the executing officer is at risk.[7] As shown below, however, none of these cases is correctly reasoned because none has undertaken the appropriate statutory and historical analysis.

#### a. The Criteria Of Section 3109 Are Not Coextensive With Those Of The Fourth Amendment.

Contrary to the government's assumption (Pet. 11 n.3), the statutory and Fourth Amendment criteria governing exceptions to the knock-and-announce requirements are not the

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[7] *See, e.g., Hudson*, 100 F.3d at 1417 (9th Cir. 1996); *United States v. Kane*, 637 F.2d 974, 978 (3rd Cir. 1981); *United Sates v. Spinelli*, 848 F.2d 26, 28 (2d Cir. 1988); *Stewart*, 867 F.2d at 584.

same. Compliance with the Fourth Amendment standard is measured not by the specific requirements of Section 3109, but only by what is "reasonable." *See Wilson*, 115 S. Ct. at 1918 n.3 ("in *Miller*, our discussion focused on the statutory requirement of announcement found in 18 U.S.C. § 3109, not on the constitutional requirement of reasonableness"); *Ker v. California*, 374 U.S. 23, 38-41 (1963) (reasonableness standard of Fourth Amendment, rather than Section 3109, governs how state officers enter a suspect's home); *United States v. Baker*, 16 F.3d 854, 856 (8th Cir. 1994) (entry by state officers governed only by "reasonableness" standard of Fourth Amendment, not by statutory criteria of Section 3109).

Thus, the Fourth Amendment and statutory no-knock provisions "are not coextensive." *United States v. Stiver*, 9 F.3d 298, 301 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 1115 (1994). Some conduct authorized by Section 3109 may nonetheless violate the Constitution; conversely, "some conduct permissible under the Constitution may be barred by Section 3109." *Stiver*, 9 F.3d at 302; *see United States v. Sagaribay*, 982 F.2d 906, 910 (5th Cir.) (although search violated Section 3109, it was still reasonable under the Fourth Amendment), *cert. denied*, 114 S. Ct. 160 (1993).

**b. <u>The Plain Words of Section 3109 Contain No Exception for Officer Safety</u>.**

In Section 3109, Congress provided that in executing a search warrant at a residence, an officer may force entry by breaking open a door or window in only three limited circumstances: (1) if, after notice of his authority and purpose, he is refused admittance, (2) when necessary to liberate himself, or (3) when necessary to liberate a person aiding him in the execution of the warrant. Conspicuously absent is any exception for officer safety. From this absence, it is reasonable to infer that Congress intended no such exception.



Traditional rules of statutory construction support this view. In interpreting a statute, the Court looks first to the plain meaning of the words used by Congress. As the Court has explained:

> As in all cases involving statutory construction, our starting point must be the language employed by Congress, and we assume that the legislative purpose is expressed by the ordinary meaning of the words used. Thus, absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.

*American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (citations and quotations omitted); *accord United States v. James*, 478 U.S. 597, 604 (1986). The language of Section 3109 is quite clear. The enumerated exceptions do not include an exception for apprehension of danger to the officers. Had Congress intended to create such an exception, it would have said so. *See United States v. Sims*, 231 F. Supp. 251, 257-58 (D. Md. 1964) (risk of danger to officer if he complies with Section 3109 does not excuse officers' breaking into hotel room by use of pass key because Section 3109 contains no such exception). Under such circumstances the rule of "*exclusio alterius*" applies.[8]

Furthermore, Congress is "presumed to know the law." *Imar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 115 S. Ct. 2322, 2336 (1995) (Stevens, J., dissenting). By 1917, when

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[8] *See Becker v. United States*, 451 U.S. 1306, 1309 (1981) (On Application for Stay, Rehnquist, J.,) ("[t]he language of Rule 62(d) seems clear, and the enumerated exceptions do not include tax summons enforcement proceedings. *Expressio unius est exclusio alterius*"); *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 188 (1978) ("In fact, there are no exemptions in the Endangered Species Act for federal agencies, meaning that under the *maxim expressio unius est exclusio alterius*, we must presume that these were the only "hardship cases" Congress intended to exempt").

Section 3109 was enacted, courts had recognized an exception for officer safety.[9] Congress nevertheless did not mention this exception in Section 3109 although Congress expressly included other exceptions. This omission provides further support for the conclusion that Congress intended no exception for officer safety.

In addition, Congress' repeal of the federal no-knock legislation only four years after its enactment, as described at pages 17-20 above, reinforces the conclusion that Congress did not intend an exception for apprehension of danger to exist. In repealing this legislation, Congress implicitly declared that compliance with the requirements of Section 3109 best assures the safety of the officers and civilians alike.

### c. If Section 3109 Incorporates the Common Law at the Time of the Framing, it Follows That the Section Contains No Exception for Apprehension of Danger Because the Common Law Contained No Such Exception.

The Court has suggested that Section 3109 incorporates the common law's knock-and-announce principle as well as its common law exceptions at the time of the framing of the Fourth Amendment. *See Wilson*, 115 S. Ct. at 1918 n.3; *Sabbath*, 391 U.S. at 591 n.8 ("exceptions to any possible constitutional rule relating to announcement and entry have been recognized . . . and there is little reason why those limited exceptions might not also apply to Section 3109, since they existed at common law, of which the statute is a codification").

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[9] *See Read v. Case*, 4 Conn. 166, 170 (1822)(plaintiff who "had resolved...to resist even to the shedding of blood...was not within the reason and spirit of the rule requiring notice."); *Mahomed v. The Queen*, 4 Moore 239, 247, 13 Eng.Rep. 293, 296 (P.C. 1843) ("[w]hile he was firing pistols at them, were they to knock at the door, and to ask him to be pleased to open it for them?").



If so, the conclusion that Section 3109 does not contain an exception for officer safety is strengthened, because at the time of the framing, the common law provided no such exception. With respect to English common law, there are "no indications" that it "ever evolved an exception to the knock and announce rule based upon a reasonable apprehension of peril by the peace officer." Mericli, *The Apprehension of Peril Exception to the Knock and Announce Rule--Part I*, 16 Search And Seizure Law Report (July 1989) at 132.

With respect to America, there are "no reported cases in America before 1791 discussing *any* exigent circumstances exception to announcement." Driscoll, *Unannounced Police Entries and Destruction of Evidence after Wilson v. Arkansas*, 29 Colum. J.L. & Soc. Probs.1 (Fall, 1995) at 26 (emphasis added). The first time a danger-to-the-officer exception was recognized in America was in 1822 in *Read v. Case*, 4 Conn. 166, 170 (1822). There the court held that a plaintiff who "had resolved...to resist even to the shedding of blood...was not within the reason and spirit of the rule requiring notice." *Id.*

At the time of the framing, therefore, about 40 years before *Read* was decided, the common law did not recognize an apprehension-of-danger exception to the knock-and-announce requirement. Therefore, Section 3109 contains no such exception, and the Court below reached the correct result.

## E. Certiorari Should Be Denied Because The Court Below Decided the Case Correctly.

In *Miller*, the Court explained that "[f]rom earliest days, the common law drastically limited the authority of law officers to break the door of a house to effect an arrest." *Id.* at 313 (emphasis added). The Court explained further:

> Every householder, the good and the bad, the guilty and the innocent, is entitled to the protection designed to secure the common interest against unlawful invasion of the house....Because the petitioner did not receive...notice before the officers broke the door to invade his home, the arrest was unlawful and evidence seized should have been suppressed.

*Miller*, 357 U.S. at 313-14.

In light of the principle that animates *Miller*, the government's insistence that property damage must play no part in the determination of whether the officers acted in an objectively reasonable manner in deciding to make a forced entry into a residence in the early morning is wrong.[10] It constitutes not only a crabbed view of the knock-and-announce principle enacted by Congress, but also a "grudging application" of the statute of the kind forbidden by *Miller* and *Sabbath*. Prevention of damage to property is a fundamental interest served by the knock-and-announce principle. Thus, the government's argument that property damage is irrelevant to the question whether the government has complied with Section 3109 makes no sense.

The law is concerned with prevention of property damage not merely for the sake of the property itself, but also because of the fear that a homeowner, upon hearing the shattering of a window or the breaking down of a door, will mistakenly believe his residence is being invaded by criminals and will take action to defend himself and his family. *See Miller*, 357 U.S. at 313-14 n.12 (compliance with Section 3109 "is also a safeguard for the police themselves who might be mistaken for prowlers and be shot down by a fearful householder."). This is precisely what occurred in the case at bar. Indeed, as recognized in *Miller*, one of the principal objectives of the

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[10]The government makes an alternative argument that property damage should at most be considered a single factor in the reasonableness inquiry, but should not act as a "switch" that elevates the level of evidence of dangerousness required to dispense with a prior announcement. (Pet. 17 n.7).



common law's knock-and-announce requirement was to protect *the arresting officers* from being shot as trespassers,

> ...for if no previous demand is made, how is it possible for a party to know what the object of the person breaking open the door may be? He has a right to consider it as an aggression on his private property, which he will be justified in resisting to the utmost.

*Launock v. Brown*, 2 B. & Ald. 592, 594, 106 Eng. Rep. 482, 483 (K.B. 1819); *see Ratcliffe v. Burton*, 3 Bos. & Pul. 223, 230, 127 Eng.Rep. 123, 126-27 (K.B. 1802) ("such conduct must...provoke [] resistance").

The same rationale obtains today. As stated by one commentator,

> an unannounced breaking and entering into a home could quite easily lead an individual to believe that his safety was in peril and cause him to take defensive measures which he otherwise would not have taken had he known that a warrant had been issued to search his home.

2 Wayne R. LaFave, *Search and Seizure* (2d ed. 1987) § 4.8(a) at 272 (quoting *State v. Carufel*, 112 R.I. 664, 314 A.2d 144 (1974)); *see Or. Rev. Stats.* §§ 161.205(5), 161.219(2), 161.225 (homeowner may used deadly force to protect persons and property if reasonably necessary). Thus, contrary to the government's suggestion (Pet. 17-18 n. 7), even a "minor amount" of property damage constitutes a basis for finding an unannounced entry unlawful.

The approach of the Ninth Circuit, as set forth in *Bustamante-Gamez*, *McConney*, and *Becker* is merely a particular application of the very test that the government urges is the law; that is, under the totality of circumstances, did the officers reasonably believe that entry without notice was necessary to prevent harm to the officers or other persons, to prevent the fugitive's escape, or to prevent destruction of evidence. (Pet. 9). As recently restated by the Ninth Circuit:

> Exigent circumstances are those circumstances that would cause a reasonable person to believe that entry was necessary to prevent physical harm to the officers or other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts. In particular, we have held that "mild exigency" is sufficient to justify simultaneous or immediate entry when entry can be accomplished without any physical destruction of property. Mild exigency exists where there is a likelihood that the occupants of the dwelling will try to escape, resist, or destroy evidence. *McConney*, 728 F.2d at 1206.

*Hudson*, 100 F.3d at 1417 (some citations omitted).

In describing some of "those circumstances" which inform the reasonableness inquiry, the Ninth Circuit quite properly considers the presence or absence of property damage an important factor. Furthermore, it is entirely appropriate for the Court of Appeals to reason that more specific inferences of danger are necessary to justify property damage during an unannounced entry into a family residence at a time when all the occupants are asleep. When a court engages in a balancing test, as the court below did here, not only does nothing preclude the court from determining that if one particular important factor exists, there should be more of another factor, but rather, this balancing of factors is an inherent part of the weighing process. *Cf. Barker v. Wingo*, 407 U.S. 514, 530-31 (1972) (in determining whether right to speedy trial is violated, a lengthy delay acts as "triggering mechanism" requiring consideration of other factors); *Cooper v. Scroggy*, 845 F.2d 1385, 1390-91 (6th Cir. 1988) (in considering whether confession involuntary under totality of circumstances, evidence of physical abuse carries great weight and raises presumption of involuntariness which other factors must overcome).



**1. <u>In Determining The "Reasonableness" Of A No-Knock Entry The Courts Look To The Totality Of The Circumstances Surrounding The Entry Including The Interests Of The Occupants In Privacy, Safety, And The Integrity Of Property</u>.**

In *Richards v. Wisconsin*, the Court stated that the Fourth Amendment's knock-and-announce requirement is excused if an officer can show a "reasonable suspicion" that danger will ensue if the officers give notice of their presence. The Court said that this showing "is not high," but it nevertheless must be met. 117 S. Ct. at 1422. Even assuming that this minimal constitutional standard applies to this Section 3109 case, the result reached by the Court of Appeals is consistent with that standard.

In *Richards*, the Court did not suggest that in evaluating "reasonableness" the courts must consider only the executing officer's state of mind with respect to his safety. On the contrary, "reasonableness" is measured "in objective terms by examining *the totality* of the circumstances." *Ohio v. Robinette*, 117 S. Ct. 417, 420 (1996) (emphasis added). Thus, a proper inquiry necessitates a consideration of "all the circumstances" surrounding the event. *Id.* at 421 (quoting *Florida v. Bostick*, 501 U.S. 429, 439 (1991)). The "touchstone of our analysis under the Fourth Amendment is always the reasonableness *in all the circumstances* of the particular governmental invasion of a citizen's personal security," *Maryland v. Wilson*, 117 S. Ct. 882, 884 (1996) (emphasis added).

With respect to no-knock entries under the federal statute in particular, the Court has emphasized that "a claim under 18 U.S.C. § 3109 depends upon *the particular circumstances* surrounding the execution of the warrant." *Jones v. United States*, 362 U.S. 257, 272 (1960) (citing *Miller*, 357 U.S. at 301, emphasis added); *see United States v. Lucht*, 18 F.3d 541, 549

(8th Cir. 1994) (in reviewing the reasonableness of a no-knock entry under the statute, courts must consider "the particular facts regarding the premises to be searched and the circumstances surrounding the execution of the warrant"), *cert. denied*, 513 U.S. 949 (1994).

For example, courts should consider, among other things: (1) whether the home is occupied by an innocent, sleeping family as opposed to a force of vigilant, armed thugs, (2) whether the entry is to be during the day or in the pre-dawn hours of the morning when the occupants will be sleeping, (3) whether or not children are likely present , (4) whether or not the occupants are likely to be frightened and mistakenly believe they are being attacked by criminals, (5) the degree of likelihood that the fugitive sought is actually on the premises, and if he is, whether he is armed and prepared to shoot at the police, (6) whether the officer must enter at all, (7) whether entry can be achieved by means of a ruse, and, most importantly, (8) whether the officer will enter peacefully through an unlocked door or whether he will enter violently, by means of kicking in the door or breaking a window. *Cf. Brown*, 52 F.3d at 421 (listing other factors); *Dorman* 435 F.2d at 392-393 (setting forth similar list of circumstances that should be considered when determining reasonableness of unannounced, warrantless entry). In the case at bar, the Ninth Circuit considered the totality of circumstances mentioned above, and its holding was "necessarily fact-bound." (Pet. 11a).

The government seeks to minimize the individual's interest in his property, arguing that it is less fundamental than the interest in avoidance of unnecessary surprise. (Pet. 10). The government cites no authority for this proposition because the law is to the contrary. As shown above at pages 13-14, preventing damage to property is one of three equally valid purposes



underlying the knock-and-announce principle. Moreover, in *Richards*, this Court rejected a similar argument. There the Court admonished as follows:

> ...[T]he individual interests implicated by an unannounced, forcible entry should not be unduly minimized....[T]he common law recognized that individuals should have an opportunity to themselves comply with the law and to avoid the destruction of property occasioned by a forcible entry. These interests are not inconsequential.

*Richards v. Wisconsin*, 117 S. Ct. at 1421 n.5 (citations omitted).

Finally, the government concedes that excessive or "wholly unnecessary" destruction of property by law enforcement officers in the execution of a warrant "may violate the Fourth Amendment's reasonableness standard, whether or not officers knock and announce before entry." (Pet. 13-14). This concession seriously undermines the government's position because, as observed by the Court of Appeals, Mr. Ramirez's property "was needlessly damaged." (Pet. 8a).

To justify its actions, the government argues that breaking the garage window simultaneously with entry was a reasonable way "to draw the occupants" away from the doors of the residence. (Pet. 17). This makes no sense for two reasons. First, reasonable law enforcement officers would hardly divert a dangerous fugitive to the garage, the *very place where guns were supposed to be*.[11] Second, as found by the Court of Appeals, and as confirmed by the wisdom of 700 years of common law, this kind of gratuitous property damage was bound to

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[11]The government appears to have its signals mixed. In the Court of Appeals, the government argued the exact opposite; there the government suggested that the agents acted wisely because they were *preventing* the occupants from gaining access to the firearms in the garage (Lodged Doc. C at 7, Doc. D at 1-2). The government's contradictory arguments highlight the sheer speculation in which the government engages to justify the officers' unreasonable actions here.

provoke a violent reaction by a homeowner who would act to defend his family and his property. (Pet. 7a-8a).

2. **Failure To Comply With The Knock-And-Announce Principle Magnifies--Rather Than Reduces--The Officers' Danger.**

The government argues that the Ninth Circuit's approach has dangerous consequences and "threatens to jeopardize the safety" of officers executing warrants. (Pet. 10). For the reasons set forth in Part D2, it is clear that the opposite is true. The very real dangers of no-knock forced entries are apparent from Congress' disastrous experiment with, and speedy repeal of, the no-knock law, the experience of 700 years of common law, and the continuing tragedies recorded in contemporary newspaper accounts. Failure to comply with the strict requirements of the knock-and-announce principle has caused, and continues to cause, many more death to both officers and civilians than the reverse.

3. **The Court Below Properly Requires More Specific Information About A Suspect's Dangerousness Before Permitting Officers To Break Into A Family Residence And Terrorize Its Sleeping Occupants By Smashing A Window.**

The government argues that the Ninth Circuit's methodology is wrong because it is unreasonable to demand specific information as to dangerousness because "such specific inferences are ordinarily unavailable to officers." (Pet. 14). This argument is wrong for two reasons.

First, the "central teaching of this Court's Fourth Amendment jurisprudence...is a demand for specificity in the information upon which police action is predicated." *Terry v. Ohio*, 392 U.S. 1, 21 n.18 (1968). In justifying the particular intrusion, the police officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those



facts, reasonably warrant the intrusion." *Id.* at 21; *see Maryland v. Buie*, 494 U.S. 325, 334, 336-37 (1990) (specific and articulable facts must be shown to authorize the police to look for others present in a home); *People v. Gastelo*, 67 Cal.2d 586, 588-89, 432 P.2d 706, 708 (1967) (specific showing must always be made to justify forcible entry). Requiring specific inferences of danger is particularly appropriate here where officers terrorize a sleeping family by breaking a window in pre-dawn hours, causing the homeowner to believe that his home is being invaded and to take wholly predictable actions to defend himself, his wife, and his child.

Second, the long history of government success under the approach that it now attacks belies the assertion that specific inferences of danger are ordinarily unavailable to the officers. The Ninth Circuit's cases are rife with instances of the availability of such inferences to the police.[12]

## CONCLUSION

Ironically, the danger to the officers in the instant case arose not from Shelby, who was not on the premises, but rather from the officers' unreasonable failure to comply with the simple and ancient requirement that the officers "ought to signify the cause of their coming, and to make

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[12]*See e.g., United States v. Hudson*, 100 F.3d 1409, 1417 (1996) (defendant recently sold drugs to informant, had prior conviction for drugs and observed with guns and drugs in bedroom); *United States v. Scott*, 74 F.3d 175, 176 (9th Cir. 1996) (defendant observed with weapon in his hand); *United States v. Perez*, 67 F.3d 1371, 1384 (9th Cir. 1995) (defendant "had shot and killed a suspected informant" and said he would "go down shooting"); *United States v. Von Willie*, 59 F.3d 922, 926 n.3 (9th Cir. 1995) (defendant armed and dangerous); *United States v. Reed*, 15 F.3d 928, 934 (9th Cir. 1994) (officer knew defendant likely armed and might escape and slammed door in officer's face); *United States v. Turner*, 926 F.2d 883 (9th Cir.) (defendant overheard to say that he kept gun for use against police), *cert denied*, 502 U.S. 830 (1991); *United States v. Ramirez*, 770 F.2d 1458, 1461 (9th Cir.1985) (police knew from teletype that suspects in a kidnaping and murder investigation were to be considered armed and dangerous); *United States v. McShane*, 462 F.2d 5, 6 (9th Cir. 1972) (defendant armed and previously convicted of shooting at an officer); *Gilbert v. United States*, 366 F.2d 923, 931 (9th Cir. 1966) (armed and alleged to have killed police officer).

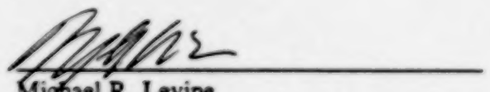
request to open doors" before destroying property and causing terror to a sleeping household. In the words of the court below, "[h]ad Ramirez been less reasonable [by firing at the intruder at the window instead of at the ceiling], the officer at the window might have been killed; had Ramirez been less wise, he or his family might have been killed." (Pet. 8a). Senator Sam Ervin could have had this case in mind when he said:

> When someone attempts to break into the dwelling house of the average citizen in the night time, the average citizen is not going to wait to ascertain whether it is an officer...or...a burglar. He is going to resist to the utmost, even to the taking of lives....It is ridiculous to say that breaking in without notice serves as protection for the police officer. The contrary is true.

*See* page 21, *supra*.

Because the Ninth Circuit reached the proper result, and for all the other reasons set forth above, the Court should deny the government's request for certiorari.

RESPECTFULLY SUBMITTED this 16th day of May, 1997.



Michael R. Levine
Attorney for Defendant-Appellant



---

No. 96-1469

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1996

UNITED STATES OF AMERICA,

Petitioner,

v.

HERNAN RAMIREZ,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO

PETITION FOR WRIT OF CERTIORARI

CERTIFICATE OF SERVICE AND MAILING

I, Michael R. Levine, counsel of record and a member of the Bar of this Court, certify that pursuant to Rule 29.2, service has been made of the within MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI on the counsel for the petitioner by depositing in the

United States Post Office, in Portland, Oregon on May 16, 1997, first class postage prepaid, a certified true, exact and full copy thereof addressed to:

Walter Dellinger
Acting Solicitor General
Department of Justice, #5614
10th & Constitution, N.W.
Washington, D.C. 20530

Further, the original and ten copies were mailed to the Honorable William K. Suter, Clerk of the United States Supreme Court, by depositing them in a United States Post Office Box, addressed to 1 First Street, N.E., Washington, D.C., 20543, for filing on May 16, 1997, with first-class postage prepaid.

DATED this 16th day of May, 1997.



Michael R. Levine
Attorney for Respondent

EDITOR'S NOTE

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Supreme Court, U.S.
FILED
MAY 16 1997
CLERK

No. 96-1469

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1996

UNITED STATES OF AMERICA,

Petitioner,

v.

HERNAN RAMIREZ,

Respondent.

DOCUMENTS A-G

LODGED IN SUPPORT OF RESPONDENT'S BRIEF

IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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FEB 03 1995

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

| | |
|---|---|
| UNITED STATES OF AMERICA, | CR No. 94-379-HA |
| v. | **UNITED STATES' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO SUPPRESS EVIDENCE** |
| HERNAN RAMIREZ, | |
| Defendant. | |

The United States of America, by and through Kristine Olson Rogers, United States Attorney for the District of Oregon, and Assistant United States Attorney Stephen F. Peifer, submits this memorandum in opposition to defendant's motion to suppress evidence.

I. INTRODUCTION

In the pre-dawn hours of November 5, 1994, several dozen law enforcement officers converged on defendant's house in rural Boring, Oregon, to execute a federal search warrant for the person of Alan Lawrence Shelby. A federal and state fugitive, Shelby had slipped from his handcuffs and struck a deputy sheriff to escape while en route to testify on an associate's behalf in Tillamook County. Shelby had a long history of escapes, violent conduct, and criminal convictions, and had vowed that he would not serve time in a federal prison.

The U.S. Marshal obtained a warrant for Shelby's arrest and conducted an area-wide manhunt that led them to defendant's house. The marshal sought and obtained authorization from the issuing magistrate to serve the search warrant at night and to do so without compliance with the knock-and-announce requirement, based on Shelby's demonstrated dangerousness.

Special "SERT" and "SWAT" teams of state and county officers surrounded the house. From the front of the residence, Oregon State Police officers shouted their identity and purpose to the occupants via bullhorns and ordered them to come outside. Clackamas County Sheriff's officers went to the attached garage, shouted "Sheriff--Search Warrant," and broke a garage window. (The plan was to secure the garage first because officers had information that defendant kept drugs and guns there.) Defendant responded by firing at the officers from the garage, striking one in the face, causing them to return fire and force defendant from the building.

After advice and waiver of rights, defendant admitted he had fired at the officers, that he owned the gun he used as well as another one in the house, and that he was a convicted felon. ATF Special Agent George Kim used that information, along with an officer's observation of a gun inside the house, to obtain a second federal search warrant (attached as Exhibit A). It permitted agents to reenter the house later the same day to

retrieve that gun and a second one hidden in a box as defendant had described.

A thorough search of the entire premises failed to turn up the fugitive Shelby. When Kim showed defendant and his young son a picture of Shelby, they both confirmed he had been at the location a few days earlier.

II. DISCUSSION

Defendant seeks suppression of the firearms on three grounds: (1) the alleged failure of the first search warrant's affidavit to establish probable cause that Shelby was in defendant's house; (2) failure to comply with the knock-and-announce requirements of 18 U.S.C. § 3109, and (3) improper execution of the warrant in violation of the Fourth Amendment.

A. The Probable Cause Issue

The law has long recognized a preference for warranted rather than warrantless searches, and thus the magistrate's determination of probable cause is paid great deference by reviewing courts. Spinelli v. United States, 393 U.S. 410, 419 (1969); United States v. Ventresca, 380 U.S. 102, 109 (1965). Affidavits are to receive a reading based on reason and common sense, without the application of a hypertechnical standard of review.

> . . . [T]he Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract. If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants must be tested and interpreted in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst



> and haste of criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no place in this area. A grudging or negative attitude toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting.

Id., 380 U.S. at 108.

According to Illinois v. Gates, 402 U.S. 213, 236 (1983), after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of de novo review. Rather, the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis" for the probable cause finding. Id. (quoting Jones v. United States, 362 U.S. 257, 271 (1960)); United States v. Di Cesare, 766 F.2d 890, 896 (9th Cir. 1985). Probable cause does not demand a showing that the belief be correct or more likely true than false. United States v. Murray, 751 F.2d 1528, 1532 (9th Cir. 1985). A practical, non-technical probability that contraband or other criminal evidence (or, in this case, the fugitive Shelby) will be found in a particular place is all that is required. Texas v. Brown, 460 U.S. 730 (1983); United States v. Seybold, 726 F.2d 502, 503-504 (9th Cir. 1984).

Under these standards, the search warrant affidavit contained more than adequate probable cause to believe Alan Lawrence Shelby was present in defendant's property, including inside his house, on November 5. A confidential, reliable informant told SA Kim that he had seen a man named "Alan" at the residence who made the approximate statement, "I had to knock out

a guard." The informant made the connection between "Alan" and Shelby when he read an article about the escape. Kim already considered the informant reliable based on earlier correct information he had provided, including facts that had led to the arrest of another fugitive felon.

Kim drove the informant near the house, and they saw a man they believed to be Shelby washing a car outside defendant's house. Kim found the man to be "very similar" to a photograph of Shelby, and the informant said he was the same man he had previously seen at the residence (who was named "Alan" and said, in effect, he had had to "knock out a guard"). Kim was close enough to see what "Alan" was wearing and that he was "clean cut."

Deputy U.S. Marshal Wayne Kauffmann, the affiant for the search warrant, drove by the residence as well. In addition to viewing the house and numerous outbuildings on the 10-acre parcel, Kauffmann saw a man resembling "Alan" come out of the house, but because of the distance he could not make a positive identification. Like Kim, however, Kauffmann was close enough to make out the man's clothing and "clean cut" appearance.

Viewed in a common-sense and realistic fashion under the totality of the circumstances, the affidavit established a "substantial basis" for the magistrate to find that Alan Lawrence Shelby probably would be found in defendant's house. The reliable informant's first-hand information about "Alan," who said, in effect, that he had knocked out a guard, coupled with



the corroborative observations of Kim and Kauffmann, persuasively established Shelby's presence at the location shortly before the warrant issued. The magistrate reasonably inferred from the facts that Shelby likely was staying there, so he would be found in the residence itself.

Defendant's argument against probable cause is the same timeworn, hypertechnical approach to search warrant analysis that federal courts have uniformly rejected. To posit, as defendant does, that the remark about having to "knock out a guard" might refer to playing touch football is directly contrary to the requirement that affidavits be interpreted in a commonsense and realistic fashion. The same is true of his criticisms of the affidavit for not listing "Alan's" identifying characteristics and not establishing his identity with a higher degree of certainty. Probable cause does not demand certainty or correctness, only a "substantial basis for belief." That standard was more than adequately met here, and this court should not disturb the magistrate's finding.

The evidence, however, is admissible irrespective of whether probable cause supported the warrant. Under the "good faith" rule of United States v. Leon, 468 U.S. 897 (1984), and Massachusetts v. Sheppard, 468 U.S. 981 (1984), the Fourth Amendment exclusionary rule is inapplicable when officers have acted in reasonable reliance on a judicially issued warrant. There are only four circumstances under which the good faith exception does not apply, and none of those circumstances is

present here: (1) if the warrant is based on a "bare bones" affidavit "so lacking in evidence of probable cause as to render official belief in its existence entirely unreasonable"; (2) if the warrant is based upon deliberate or reckless material misrepresentations by the affiant; (3) if the issuing magistrate has wholly abandoned the required neutral and detached judicial role; or (4) if the warrant's particularization of the place to be searched or the items to be seized is "so facially deficient . . . that the executing officers cannot reasonably presume it to be valid." Leon, 468 U.S. at 923; see United States v. Michaelian, 803 F.2d 1043, 1046 (9th Cir. 1986). Defendant has not alleged, and cannot prove, any of these factors.

B. The Knock-and-Announce Issue

Officers serving a search warrant at a house ordinarily must announce the authority under which they are acting and the purpose of the call. If they are refused admittance to the premises after the announcement, they may enter forcibly. 18 U.S.C. § 3109; United States v. Woodring, 444 F.2d 749 (9th Cir. 1971). Courts relax these requirements, however, when exigent circumstances make observance of the statute inappropriate. See United States v. Turner, 926 F.2d 883, 886-87 (9th Cir.) cert. denied, 502 U.S. 830 (1991). Here the officers announced their identity and purpose but, for safety reasons, broke the garage window before waiting for the occupants to respond.



The most recent case on the subject in the Ninth Circuit is United States v. Becker, 23 F.3d 1537, 1541 (9th Cir. 1994), where the court held that "mere unspecific fears" about peril to officers does not justify relaxation of the rule. Becker discussed a two-tiered approach to exigency. Citing United States v. McConney, 728 F.2d 1195, 1206 (9th Cir. 1984) (en banc), the court stated that "even mild exigency, like knowledge that a person is dangerous, can justify immediate entry where that can be done without any physical destruction of property." Becker, 23 F.3d at 1540. See also United States v. Arias, 923 F.2d 1387, 1391 (9th Cir. 1991). To justify physical destruction of property (as occurred here), "[m]ore specific inferences of exigency are necessary." Becker, 23 F.3d at 1541 (quoting McConney, 728 F.2d at 1206).

Ninth Circuit decisions have demonstrated the types of circumstances that do not justify forced entry. In United States v. Mendonsa, 989 F.2d 366, 370-71 (9th Cir. 1993), there was insufficient exigency based merely on the occupant's prior armed robbery conviction, a little noise inside the house, and the "inherently dangerous job of arresting drug dealers." Officers in United States v. Moreno, 701 F.2d 815, 817-18 (9th Cir. 1983), vacated on other grounds, 469 U.S. 913 (1984), feared destruction of evidence just because there was "always" a danger in drug cases. That was not an adequate reason for forced entry, the court held. Although officers in United States v. Fluker, 543 F.2d 709, 717 (9th Cir. 1976), believed an occupant owned a gun

and there was a general fear that narcotics might be destroyed, there was insufficient exigency. Finally, in Becker, there was no exigency based on a generalized fear that the homeowner might be dangerous and that a methamphetamine laboratory might be on the premises.

The highly specific facts indicating dangerousness in the present case stand in sharp contrast to the "generalized fears" outlined in the above decisions. As set forth in detail in the search warrant affidavit, fugitive Alan Lawrence Shelby had a history of escapes and assaultive behavior. A few days earlier, he had escaped from a deputy sheriff by slipping out of handcuffs, striking the deputy and knocking him down. Shelby was serving long federal sentences for manufacturing methamphetamine and use of a firearm during a crime, concurrently with a state sentence for armed robbery at the Oregon State Penitentiary. Shelby had accurately predicated he would escape from a transport van if given the opportunity and vowed "not [to] do federal time."

In 1991 Shelby struck a corrections officer in the face and kicked out a jail door. While fleeing the jail, he assaulted a woman, stole her vehicle, and then rammed a police vehicle. While awaiting trial on narcotics and weapons charges in Eugene, Shelby attempted a jailbreak by constructing a rope from torn bed sheets and breaking a window.

He had threatened to kill witnesses and police officers associated with his incarceration. Also, Shelby had used a



hammer to brutally torture people. A major methamphetamine manufacturer, he had access to large caches of weapons. Although not detailed in the affidavit, the officers also knew Shelby's long criminal record included several convictions for armed robbery.

For these specific and detailed reasons, the officers considered Shelby to be an extreme danger to their safety. There was every reason to believe he would not submit peaceably to their authority but would, as usual, react violently. "Armed and dangerous" seriously understates his status and the peril faced by law enforcement officers in recapturing him. Also, the officers had information that defendant sold drugs and kept drugs and guns in the garage, which his later violent reaction confirmed. The officers thus had a highly persuasive basis for non-compliance with the knock-and-announce rule.

In addition to his argument under 18 U.S.C. § 3109, defendant contends the officer's actions were unreasonable under the Fourth Amendment. There is no authority for the proposition that the federal constitution provides broader protection or a stricter knock-and-announce rule than that of § 3109. In fact, the law may be the reverse. See Ker v. California, 374 U.S. 23, 38-41 (1963) (reasonableness standard of Fourth Amendment, rather than the federal statute, governs how state officers enter a suspect's home); United States v. Bustamante-Gamez, 488 F.2d 4, 9 (9th Cir. 1973) ("to some extent," the requirements of § 3109 "have been incorporated into the Fourth Amendment"), cert.

denied, 416 U.S. 970 (1974). At any rate, the same demonstrated exigencies that sufficed to excuse § 3109 compliance also met the Fourth Amendment reasonableness test.

Finally, the magistrate-judge's endorsement of a "no-knock" clause in the warrant, while not explicitly authorized by statute, in no way illegitimized the officers' conduct. If anything, the endorsement manifested their good faith in submitting the matter to judicial analysis prior to the warrant's execution. It certainly did not affect the legality and constitutionally of the entry, which passes muster under the objective exigency test as discussed above.

C. Inapplicability of the Exclusionary Rule

The government's primary position is that the search warrant was a lawful one based on probable cause and that a specific showing of exigency excused compliance with the knock-and-announce rule. Even assuming, arguendo, that either of these positions is incorrect, it does not follow that the court must exclude evidence of the two firearms forming the basis for defendant's indictment. Rather, defendant's intervening act of shooting from his house renders the exclusionary rule inapplicable to the firearms since they were not "fruit of the poisonous tree."

Wong Sun v. United States, 371 U.S. 471, 487-88 (1963), the seminal case in the field, described the limitations of the exclusionary rule:

> We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is whether, granting establishment of the primary illegality, the evidence to which instant objection is made was come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.



There is a body of law holding that, when a person subjected to an allegedly illegal search or arrest responds with force against the officers, resulting evidence is not fruit of the poisonous tree. See 4 La Fave, Search and Seizure: A Treatise on the Fourth Amendment § 11.4(j) (2d ed. 1987 and 1994 Supp.). Here, the discovery and ultimate seizure of the firearms (under a second search warrant) resulted from defendant's use of force against the officers, not from any exploitation of what defendant asserts was illegal activity.

Several federal cases illustrate this point. In United States v. King, 724 F.2d 253 (1st Cir. 1984), the court assumed, without deciding, that the officers committed some illegality in attempting to search defendant, but he responded by shooting at them. "We believe the shooting was an independent intervening act which purged the taint of the prior illegality," the court stated. Id., 724 F.2d at 256. King cited favorably United States v. Bailey, 691 F.2d 1009 (11th Cir. 1982), cert. denied, 461 U.S. 933 (1983), and United States v. Nooks, 446 F.2d 1283 (5th Cir.), cert. denied, 404 U.S. 945 (1971), where the courts admitted evidence discovered when an illegal stop was interrupted by a defendant's flight. "In each case the search was in

progress when flight occurred. In each case the court held that the flight constituted an intervening act which provided probable cause for the ultimate search." King, 724 F.2d at 256.

United States v. Waupekenay, 973 F.2d 1533 (10th Cir. 1992), reached the same result for a different reason. Defendant in that case pointed a gun at the police after they had illegally entered his premises. The court held:

> We conclude that Mr. Waupekenay did not have a legitimate reasonable expectation of privacy when he initiated criminal activity--assault--in the presence of the police officers within the trailer. Once Mr. Waupekenay was aware that the police officers were present in his home and were observing him, he could not have had a reasonable expectation of privacy for any actions initiated subseguently to that time in their presence. He obviously intended for the police to see him aim a semi-automatic weapon at them. Thus he could not have had a legitimate expectation of privacy in that action [citation omitted].
>
> * * * *
>
> Our decision is consistent with the holding of many other courts, state and federal, that have considered situations in which a defendant seeks to suppress evidence relating to his or her violence or threatened violence toward police officers subsequent to an unlawful search or seizure or a warrantless entry. In assault, resisting arrest, disorderly conduct, and weapons related trials, these courts have uniformly rejected motions to suppress arising from skirmishes comparable to the one at issue in the instant case . . . . [citations omitted].

Id., 973 F.2d at 1537. In addition to King and Nooks, the court in Waupekenay cited 13 other state and federal cases supporting its holding in similar contexts.

Among the many state court opinions on this issue, State v. Villarreal, 152 Ill. 2d 368, 178 Ill. Dec. 400, 604 N.E. 2d 923



(1992), deserves mention. The Illinois Supreme Court held that defendants were precluded from resisting police officers' attempt to enter a house to arrest a third party, regardless of whether the police actions would have been legal. The exclusionary rule cannot be applied to suppress actions directed against the police, even when the police illegally enter a defendant's home to arrest another person, the court held. Id., 604 N.E. 2d at 927.

Here, defendant responded to the officers by shooting at them from his home. His intervening action created an independent basis for what followed, namely, his removal from the house, his questioning (with admissions of gun ownership and felon status), and seizure of the firearms pursuant to a second search warrant. Even if there were arguable illegality in the initial police conduct, all the intervening events occasioned by defendant's armed resistance (including the seizure of the guns) are not subject to the exclusionary rule.

III. Conclusion

For the above reasons, the court should deny defendant's motion to suppress.

DATED this 22nd day of February, 1995.

Respectfully submitted,

KRISTINE OLSON ROGERS
United States Attorney

STEPHEN F. PEIFER
Assistant United States Attorney

(B)

JUN 13 1995

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | Cr. No. 94-379-HA |
| versus | ) | April 25, 1995 |
| | ) | |
| HERNAN RAMIREZ, | ) | Portland, Oregon |
| | ) | |
| Defendant. | ) | |

Transcript of Motion to Suppress

BEFORE: THE HONORABLE ANCER L. HAGGERTY, UNITED STATES DISTRICT COURT JUDGE

APPEARANCES OF COUNSEL

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Stenographically reported, computer-aided transcription

April 25, 1995

PROCEEDINGS

MR. PEIFER: Good morning, Your Honor. This is United States versus Hernan Ramirez, Cr. 94-379-HA. Defendant is now present before the Court with counsel, Michael Levine.

Your Honor, this is the time set for a hearing on defendant's motion to suppress. The parties have submitted a stipulation of facts regarding the knock-and-announce issue, both the statutory and constitutional aspects of it. We thought it would be better to do that than to present lengthy testimony, considering the number of people involved and the amount of time it would take for the Court.

THE COURT: I've read the parties' stipulation of facts. I've read the motion to suppress with the accompanying memorandum in support, as well as the United States' memorandum in opposition to the motion to suppress. And I believe I have the reply from Mr. Levine, as well, and I've read through those.

And I believe the Court understands the issue as whether, by the officer's breaking of the window, the destruction of property, is that a sufficient basis to then say that the government has not complied with the



knock and announce?

MR. LEVINE: Partially, Your Honor. Not quite. Going to that, the manner of execution -- let me just back up for a moment and state, as the Court is aware, there are really two motions before the Court, in a sense. One is that there is insufficient --

THE COURT: Probable cause for Mr. Shelby.

MR. LEVINE: Probable cause to enter to pursue Mr. Shelby. And then the second issue, which the Court -- let's focus on that since the Court has inquired on that.

The breaking and the entering being simultaneous, if you will, with the announcement -- that's the stipulation in essence -- that, under United States versus Becker -- there's no question that that on its face does not comply with a knock-and-announce statute.

What that does, now, is require the government to show exigent circumstances. And with the break -- it's kind of a shifting line, according to the law, at least as I read it. When there's a breaking of property or a destruction of property, as there was in this case, the Court says there has to be a higher -- a more specific detailed accounting of exigent circumstances.

I might just point out Becker, I think, is the most recent case, and the leading case now in the circuit. But it points out that the mere incantation by

the government of the phrase "exigent circumstances" -- and I'm quoting here, "does not dissolve -- does not dissolve the shield that our law provides."

I mean, there's always some degree of exigency any time law enforcement officers are looking for anybody. That can't justify the breaking and entering into a home.

So the question is, in this specific case is the specific articulation of exigency in this particular case sufficient, as a matter of law, to justify a -- what amounts to a wholesale breaking and entering into the property and particularly into the garage, which is where the -- which is part of the property? It's an attached garage.

For the Court's convenience, I've simply blown up, with the government's permission -- we've blown up the diagram, the exhibit. It's identical. But the entry occurs here at the garage window. But this is a standard attached garage to many residences, a door here into the garage. So, for all intents and purposes, this is the residence.

I think that -- I think, clearly, this was inappropriate. We have here a Saturday morning in the early morning hours, when agents know or must know, have to know, that the residents will be asleep. We have a husband



and wife and a three-year-old child asleep in the master bedroom. And we have what ensues, exactly what one would expect to ensue when agents don't comply with the law. We have what almost was a true tragedy.

But I think it was best expressed by Sam Irvine in my motion. I quoted from Sam Irvine when he was talking about why the Congress abolished the no knock. The agents talk about exigent circumstances and fear for their safety as justifying a breaking with a simultaneous announcement. That's what they claim in this case.

But what does Sam Irvine say? "I know of no provision of law which puts officers of the law in more jeopardy of life and limb than a provision which undertakes to authorize no-knock searches of the homes of our citizens. When someone" -- and this is the key statement. "When someone attempts to" -- and I'm quoting now from my motion at page 12. "When someone attempts to break into the dwelling house of the average citizen in the night time, the average citizen is not going to wait to ascertain whether it is an officer of the law or whether it's a burglar. He is going to resist to the utmost, even to the taking of lives, the unwarranted intrusion into his house by someone who attempts to enter without notice, without identifying himself, without revealing his status as an officer of the law, and who attempts to enter by force like

common burglars. It is ridiculous to say that breaking in without notice serves as a protection for the police officer. The contrary is true."

Now, the courts have held that -- while this statement refers specifically to breaking without any notice, the courts have essentially held -- at least Becker and Mendonza and the other cases -- that simultaneous entry and announcement is the same evil. There's no difference, because it's -- if a home owner hears breaking and someone shouting, it's impossible to make out, as it was in this case, what exactly is being shouted, particularly at 6 o'clock in the morning on a Saturday morning.

Your reaction is -- if anyone's ever listened to bullhorns or tried to listen to bullhorns, they're virtually unintelligible most of the time. Even in the stipulated facts, one of the officers, who's right by the garage, he couldn't hear the bullhorning that was going on in the front. And the stipulation -- on the stipulation of facts, this is all happening simultaneously, the bullhorning in front, the officers shouting as they're breaking the garage window, "Search war ınt, search warrant."

The point is you should do this in advance unless -- unless the government can establish and prove that circumstances were such -- they were of such an



emergency nature, of such an exigent circumstances that the agent should not have to announce at all; they can simply break in, if you will, or break in and simultaneously announce. No doubt there are circumstances like that, but this case does not rise to that.

Now, the government says, "We have information that Shelby is an escape risk." And we don't dispute that. "We have information that Shelby knocked out a guard." And we don't dispute that. We've stipulated to that. "We have information that he has said he did not want to do federal time." We've stipulated to that.

Still, when you take all that together, that does not mean that 40 or 50 agents have to break into a residence to arrest Mr. Shelby. If anything, if he is as dangerous and -- if he is as dangerous as they claim, it's the exact opposite. They're inviting themselves to be shot to death, it seems to me, by doing that.

And I don't want to -- I'm not second-guessing how police operate. But we have only to look at recent traumatic events all over the country, Your Honor, where there's been an excess, I'm sorry to say, of inappropriate entering by police officers, these task force -- inappropriate, causing terrible destruction. And the problem can be avoided by simply following knock-and-announce principles.

We have no information that Shelby has ever shot at a federal -- has ever shot at any police officer, much less at a federal police officer. Nothing, not a shred of evidence to that effect. No information that Shelby had a weapon with him, no information that Shelby, for that matter -- that's the first part of my -- first part of my motion, that -- was spending the night in the residence.

Now, in Mendonza, in Becker they looked to the fact that the evidence -- that the person they sought wasn't in the residence or the evidence they sought wasn't in the residence as sort of a vindication of the fact that there was no exigent circumstances. And I'm going to do that, too. Shelby wasn't in the residence.

Now, in one sense that's irrelevant, because you're looking at the state of the mind before. But it also corroborates the fact that officers are wrong. They're wrong. And we have -- with respect to drugs, we have an informant and firearms. We have an informant saying, "There's supposed," -- and that's the word in the stipulation, "There's supposed to be firearms in the garage." That -- that is not, to me, a statement that ought to provide the Court with a sense of there are firearms in the garage which justify exigent circumstances, and there might be drugs. I forget the exact -- "There



possibly are drugs in the garage," and there were supposed to be firearms. That is not a exigent -- that does not give rise to exigent circumstances.

The proper thing for the police to have done in this case would have been surround the residence. We had plenty of officers, plenty of fire power, as we can see by the fuselage (sic) that was -- that Mr. Ramirez was met with. Surround the residence, announce on the bullhorn simply, as they did, but wait and have the residents have a chance to get out of bed and answer the door, find out what is happening, and come out with their hands up.

THE COURT: Okay. Even assuming everything you say is correct up to this point --

MR. LEVINE: Yes.

THE COURT: -- the stipulation does not, as I see it, take away the good faith belief that the officers thought they were executing a valid warrant, under Leon. So if you look at that as an issue, there was nothing seized as part of this initial entry. Nothing was seized. The gun was left there. They did, in fact, get one statement from Mr. Ramirez to the fact that he had the gun and that he was a prior felon.

MR. LEVINE: Yes.

THE COURT: They then come back, apply for, and receive additional search warrants.

MR. LEVINE: Yes.

THE COURT: Go back and actually seize the gun that you're seeking to suppress.

MR. LEVINE: Yes.

THE COURT: That's all you're seeking to suppress, is that gun.

MR. LEVINE: That's right, the firearm.

THE COURT: So if the officers in good faith were executing a valid warrant for Mr. Shelby, how do you then conclude that the subsequent seizure of the gun was unreasonable?

MR. LEVINE: All right. There are two parts to your argument. First of all, with respect to good faith, there's nothing in the stipulation respecting the officers' state of mind. There's no -- there's no concession in here, and I don't think there's any fact -- I -- there's certainly nothing in here wherein the defense concedes the good faith, and there's nothing in here respecting officers' state of mind.

The only thing that's in here is what the officers learned or heard or was told to them. That's a separate inquiry. There's nothing in the stipulation that goes to good faith.

Second, if there -- good faith. Even if the Court were to find good faith, and the Court can't find it



from this stipulation, there's just no facts in that regard, from my judgment.

THE COURT: But there was a warrant that was issued by the Court.

MR. LEVINE: Yes. But the burden -- the burden of proving good faith is a burden on the government, according to the United States versus McKelly. The Court will have to take -- the Court will have -- if the government wants to proceed with a good faith argument, which it did in its motion, I believe that the -- we'll have to take evidence on that.

We may have -- unless Mr. Peifer has another suggestion. I don't -- it was not covered -- certainly is not covered in this stipulation. The law of good faith is discussed in the motions.

But, moving to the law, it's my position that the good faith -- good -- one of the exceptions in Leon to the good faith principle is where the affidavit lacks the indicia -- is lacking the indicia, even minimal indicia, of probable cause.

And I have submitted, for the same reasons that I've just argued, that there's simply no probable cause, even the indicia of probable cause, to believe that Mr. Shelby was spending the night in this residence on November 4th and 5th, midnight being -- bringing it over to

the 5th. There was no probable cause that Mr. Shelby was in this residence, which brings me to the first motion.

What is the probable cause to believe that Shelby is actually in this residence on the night of November the 5th? What do they have? They have the day -- on November the 3rd, an informant calls up the marshals and says, "I was introduced to a man named Allen." Okay. "And I overheard approximately -- this Allen say approximately, 'I had to knock out a guard.'"

That's their evidence of probable cause, that Allen Shelby, the escaped fugitive, who said that on Thursday, is now sleeping in this house on Friday.

Now, of course, they have more. The agent comes up, Agent Kim, comes up the next day, November the 4th. And they look from away, a thousand yards away, apparently -- apparently. They don't say. There's nothing in the stipulation -- whether it's through binoculars or not.

But they look, and they see someone who's very similar, they say, to -- very similar to the picture of Allen Shelby, washing a car. Washing a car. It's not exactly in front of the residence. We don't know exactly where. Washing a car. I'm sorry. I think it's by the shop area is where they see him washing a car right here by E.



Now, when -- where does one make the leap of logic that if someone is washing a car during the day, that he is, therefore, spending the night in the home owner's residence? That defies common sense. It defies logic. There are all kinds of people that wash cars. There are guests, there are friends, there are people. This is a shop area. What is the evidence that he's in the residence? None. That he's spending the night in this residence? None.

If we allow the officers to make that -- to make that leap, then anybody's house is subject to search because someone was seen outside washing a car.

Now, I believe at one point somewhere in the affidavit there's a statement that Shelby was seen walking out -- to be fair, walking out the front door of the house. But that's during the day. People go into a house to get water, to work. All kinds of workmen do that all the time. Even assuming this is Mr. Shelby, assuming this is certainly Mr. Shelby, I would argue there's no probable cause to believe that he's spending the night.

The agents have to do a little more work, it seems to me, before they could go to a magistrate and say, "We've seen Shelby out here. He's sleeping in the residence."

And with respect to whether it is Shelby,

even, we have a statement that he looks very similar to the picture. Well, why does very similar-looking to a picture mean that that's probably him, particularly when you look at what isn't in the affidavit?

We know the description of Mr. Shelby. We know the specific, detailed physical description of Mr. Shelby. It's right in the affidavit. It's right on the warrant. He's 5 foot 9, he's got blond hair, he's got blue eyes. Is there any statement in the affidavit that the man they saw was 5 foot 9, blond hair, blue eyes? No.

Now, how do you normally describe people? That's the first thing you do, is give a physical description. And, as I argue in my motion, Your Honor, agents properly draft affidavits to bring the strongest light -- to put the evidence in the strongest light to the magistrate. That's understandable. They want to persuade a magistrate that there's probable cause. They are going to put in every shred of evidence that will persuade this magistrate that this is the man.

The fact that they didn't put in the description, I submit, is an inference you should draw against the government that the person they saw did not fit the description of Allen Shelby. He was not 5 foot 9. Because, Your Honor, if they put in, "We saw a man who was



6 foot 6," the magistrate's going to go, "Well, this isn't Allen Shelby." So they didn't put that in.

It's very -- it's easy to say -- and people look alike, very similar. What does that mean? But without the physical description, it seems to me that their case for probable cause to believe that Allen Shelby was on the residence -- was at this residence is deeply undermined.

But there's more. They make a -- they make a point in the affidavit twice, saying, "Mr. Allen Shelby was clean cut." The person they saw -- the person they saw was clean cut and was wearing blue overalls or a blue jumpsuit -- a blue jumpsuit. That's the person they saw.

But the description of Allen Shelby, when last seen, says nothing about his being clean cut, says nothing about his wearing a blue jumpsuit or overalls. The only description was the 5 foot 9, blue eyes, blond hair, which they repeated, and there's nothing about that with respect to the individual here.

So, Your Honor, I don't think the good faith argument can succeed on two grounds. I don't think there's a good faith belief that the person is Allen Shelby, number one. But even if he is, even you can say there's a good faith belief that that person was Allen Shelby, there's no good faith belief that that Allen Shelby was spending the

night, November the 5th, in this residence, not a shred of evidence. And it's not fairly inferable from any of the evidence.

And it is true that the agents got the -- a second warrant, but that's exactly what happened in Becker. In Becker there was an original warrant that was issued, and then the agents went and retrieved a second warrant based on what they saw. So the fact that there are two warrants is really immaterial.

The question is, is what's going into the second warrant a fruit of an illegal first warrant, either an illegal first warrant that's been issued or an illegal first warrant that's been executed? I've argued that it's illegal for both reasons independently. But if the Court finds that, of course, either that the issuance of the first warrant was unlawful or that the execution of the first warrant was unlawful, then the fruits of that warrant are suppressible and cannot be used as facts to provide probable cause for issuance of the second warrant.

Now, the government made some -- made an argument that, while the shooting -- they admit that the shooting came in response to the first warrant. But then they say, once the -- once Mr. Ramirez shot, that that provided -- that that was an intervening -- an intervening act, which in itself provides -- if I understand the



argument, provides probable cause.

Well, the cases they cite don't stand for that. They do cite various cases where there are intervening acts, but none of those cases stand for the proposition that where a home owner, in defense of his wife and his child, shoots what he perceives to be a marauding band breaking into his home, that that justifies the marauding band to later get a second warrant based on the gun shot. That would defeat the whole purpose of the Fourth Amendment, it seems to me.

The agents can't say, "Well, look what happened," and use that as grounds for going and getting a warrant. They created, if you will, their own exigency.

And I'd be happy to answer any other questions the Court has.

THE COURT: Let's hear from Mr. Peifer.

MR. PEIFER: Yes, Your Honor. First, on the issue of probable cause, the Court has to look at the affidavit from a common sense, nontechnical standpoint, giving deference to the magistrate in this case, Judge Ashmanskas, who had the opportunity to review it and draw reasonable inferences from it. And the standard is a substantial basis to believe that Mr. Shelby was there, not proof beyond a reasonable doubt, not something that we would argue to a jury.

There was ample support for probable cause in this case. Mr. Levine sort of brushes aside the fact that this confidential, reliable informant stated that someone by the name of Allen stated in his presence, while on Mr. Ramirez's property, that he had to knock out a guard. It isn't just the identification of the -- the visible identification of Mr. Shelby. It's the fact that he identified himself as Allen and said he had to knock out a guard, which is the -- one of the most -- the operative point involved in his -- his escape from custody just a few days before that.

The informant and Agent Kim saw a man that they identified as Mr. Shelby from a distance, that they said -- according to the affidavit, they believed it was Mr. Shelby, and they said it was very similar to what they knew Mr. Shelby to look like. Also, Deputy U.S. Marshal Kaufman, from a distance, drove by and saw a man resembling Shelby come out of the house -- come out of the house.

So we have the issue, first, of whether it' is Mr. Shelby. And I would submit to the Court there's very strong evidence to believe that it was Mr. Shelby, primarily based upon his own statements as well as the identification by the agent and the confidential, reliable informant.

And, secondly, would he be there at the



premises? Now, we have somebody who's there once before when the informant was in his presence, heard him speak, and then he's still there when the agent drives by with the informant, and he's still there when the Deputy U.S. Marshal drives by. So we have a period of time by which the Court could infer that it wasn't just a quick in-and-out visit. It was somebody who was there at the premises for a period of time.

On the good faith exception -- and the Court doesn't have to reach the good faith exception if you find probable cause. And I would submit that there's strong evidence of probable cause here. But if you do need to reach the good faith issue, all four of the elements of the burden that the government has to prove have been met here, to exclude the exceptions to the good faith exception.

First of all, this was not a bare bones affidavit. The Court, I think, knows, from years of experience, what a bare bones affidavit would look like, and this simply isn't one. It has a substantial basis to believe Shelby was there. There are no misrepresentations in this affidavit. If there had been misrepresentations, Mr. Ramirez could have filed his motion to contradict the affidavit. There's been no claim that the confidential, reliable informant should not be believed, and there's been no evidence and no claim made by anybody that anything in

the affidavit is not worthy of belief.

Secondly, there's no violation of the requirement for a neutral and detached magistrate. I think Mr. Levine is stretching it when he says that the government has to present live testimony by which the Court has to conclude that these elements are not present here. There's no -- there's absolutely no evidence on the face of this affidavit and the warrant to conclude that there was a violation of a neutral and detached magistrate requirement.

And, fourth, the particularization requirement was met. All you have to do is look at it to see that it's very well described.

Now, the issue of knock and announce. Mr. Levine says that this is a situation where the officers created their own exigency, and that's really a fiction in this case. They didn't create the presence of Mr. Shelby. They didn't create Mr. Shelby's long history of violence, his history of escape, his history of armed robbery, weapons possession, all the things that I'll itemize in a moment. They didn't create those things. They didn't create the information that, as it turned out, there was a firearm in that garage, because it was fired by Mr. Ramirez. They didn't create that out of whole cloth. And they certainly didn't create their exigency by breaking that window simultaneously with their announcement that --



the exigency preexisted the entry by the officers.

The Becker case is very useful for the Court, not only in stating the standard, which in this case must be specific inferences of exigency to justify the breaking, but Becker's also useful to show you what isn't good enough to show specific inferences of exigency, because it not only discusses its own facts in Becker but other cases. And, by and large, those cases have to do with just a generalized fear that, because of the nature of a person's criminal activity, because they happen to be involved in drugs, or they happen to have been convicted of something in the past, that alone without any specific itemization of what it is, does not rise to the level of exigency for purposes of knock and -- of noncompliance with knock and announce.

Now, here we had very specific information regarding Mr. Shelby. In 1991 he struck a corrections officer in the face. He kicked out a jail door. He assaulted a woman while escaping. He stole her car, and he rammed a police vehicle. That was in '91.

In 1992, when he was being held for the federal drug charge in Eugene awaiting trial, he attempted a jail break with a broken window and rope being made from some bed sheets.

In 1994, which is the incident which led to

his being a fugitive in this particular case, he struck a Deputy Sheriff while he was en route to testify in Tillamook County, Oregon. He was able to slip out of his handcuffs, struck the deputy, and fled. So there we have three documented cases of violent escape or attempted escape by force involving this Mr. Shelby.

It's undisputed that he said he would not do federal time. Here we have a person -- not only does he have a long history of escapes, but he's made it very clear that he's not going to federal prison.

The affidavit also says that he threatened to kill witnesses and police officers associated with his incarceration, again, consistent with his nature and his track record. He had used a hammer to torture people. He was a major methamphetamine manufacturer, and he'd been convicted of using a firearm in connection with that federal drug conviction.

He also -- and the Court would expect this, but there's specific reference here -- he had access, through his methamphetamine connections, to a large number of weapons. He owed a great deal of prison time on the state and federal level. He owed 240 months on his federal conviction out of Eugene. So there's a great incentive on his part to follow through on his threat that he would not do federal time.



And we also have the information from the confidential informant who said, according to the affidavit, that there was possible possession of drugs and firearms in the garage. This explains why the officers did what they did.

Mr. Levine would have the Court believe that this was just stupid on the officers' part to do this, but actually it was a very well-reasoned, well-planned, intelligent approach. Because if Mr. Shelby is there, the last thing they want to do is comply to the letter with knock and announce, knock on the door, wait awhile before they actually enter, because that would have given Mr. Shelby, or anybody else in the premises, time to react.

What they did was they went to that garage window and broke it out simultaneously with the announcement, in order to make sure that they were covered, where they expected to find guns in the house. And that's exactly what happened, because Mr. Ramirez fired off two rounds from his gun as a result of that entry.

So that was a very reasonable approach on the officers' part, and I think they would have been derelict if they'd done it any other way. They would have been derelict if they'd gone in and just broken down the door, because that would have created an even worse exigency in terms of the situation, and they would have

been even more derelict if they had -- as Mr. Levine says, if they'd complied with the knock-and-announce requirement.

The Court also has before it an alternative argument. And the Court doesn't need to reach this, but it's there if the Court needs it. And that's the alternative argument that, even assuming there was a violation of knock and announce that couldn't be excused by some exigency, we have the intervening act of Mr. Ramirez firing off rounds at the police or, as he characterizes it, firing up into the ceiling to scare them off. Well, they can hardly be expected to believe that he was simply trying to warn them under the circumstances when one of the deputies was hit in the eye with a piece of metal.

Under those circumstances, you have a break in the chain which, under the law, would terminate the application of the exclusionary rule at that point. And that's why I cited a number of cases from a number of different jurisdictions which demonstrate how this rule applies, that whether it's an illegal search or an illegal arrest, that when the defendant or the person being searched, the person being arrested, reacts violently, then the exclusionary rule doesn't apply at that point, because that is conduct on the part of the defendant himself which the officers not only have a right to respond to, they have an obligation to respond to.



And here they did respond appropriately. They went ahead and executed the warrant. They saw the gun in the living room where Mr. Ramirez had thrown it. Then they got another warrant. And, as the Court has referenced that, that was a follow through on their exercise of good faith in this case.

THE COURT: Could they have seized the gun right then and there without the second warrant?

MR. PEIFER: I think that they could have, because it was in plain view. It wasn't -- it was probably an exercise of extreme caution on their part not to seize it. But it was in plain view during the execution of the warrant when they were looking for Mr. Shelby. They didn't have to move anything to find it. But they did get another warrant. And that was certainly, as the Court noted, a further exercise of good faith on their part.

So we actually have three elements of good faith shown in this case. We have the warrant itself, the initial warrant, which obviously was signed by Judge Ashmanskas under the protection of the warrant requirement. They asked Judge Ashmanskas to authorize a no-knock entry.

Now, there is no -- and Mr. Levine is right. There is no statutory provision for this, but they ran it past the Court. They gave him the facts and asked for a judicial opinion. It's not controlling, but it does show

that they were acting in good faith. They didn't just go and do it on their own without running it past the Court. And, thirdly, they went and got a second search warrant, instead of, as the Court noted, simply following through on what they had actually seen, which showed further good faith.

But I want to make clear to the Court that the good faith exception does apply here, but it's not necessary to reach that, and it's not necessary to reach the exclusionary rule argument either, that this is a case where there was ample probable cause, and there was every good reason to not comply technically with the knock-and-announce requirement.

And on that regard, there was a technical violation of the knock-and-announce requirement. They did not wait after announcing before they broke and entered. All it was was the garage window instead of the door, which is normally what happens in a search situation. But -- we're not quarreling with that as being a violation, but it's not the kind of egregious violation that could have occurred in this case but didn't.

When you have 45 law enforcement officers surrounding a house, you can imagine what they could have done if they wanted immediately to enter, but they didn't do that. They took a very measured, careful approach to



the matter and complied with the law every step of the way.

Thank you.

THE COURT: Anything further, Mr. Levine?

MR. LEVINE: Yes, Your Honor. I don't think it shows good faith to ask a magistrate for something that the magistrate has no authority to do. The officers should have told the magistrate, "We're asking you for authority to enter without knocking and announcement, but there's no statutory authority for you to make this." They didn't tell the magistrate -- to enter that order. They didn't tell the magistrate that. I don't see why -- how that evidences good faith.

Second, the agents did not overhear -- the informant did not overhear the person named Allen say, "I had to knock out a guard." It's quite clear in the affidavit that what the informant heard was approximately that statement. That's in the affidavit. Now, that is a fundamentally important word, Your Honor, because that means, as I've argued, that the informant is not reporting the exact words that this Allen said.

But that's critical, because the way it's phrased here, "I had to knock out a guard," that's quite one thing if those were the exact words spoken. But if they were not the exact words spoken, and the word "approximately" says those were not the exact words spoken,

what you really have here is you don't know what -- you don't know what was said by Allen. Was it something about a guard or something -- did he use the word "hard," or did he -- how was the phraseology?

The government is presenting this as if these are the exact words and arguing that to the Court, and that's not the case, by their own affidavit.

THE COURT: Let me ask you the same question I asked Mr. Peifer.

MR. LEVINE: Yes.

THE COURT: Once the officers are inside and executing a warrant for Mr. Shelby, they see the gun laying in the living room on the floor, can they seize it?

MR. LEVINE: Well, I don't know what theory they would seize it. It's not a crime at this point. There's no -- it's not a crime for a person to possess a gun. They never charged him -- they've never -- I suppose if they were to charge him -- it's a crime for an ex-felon to possess a gun, but there's no knowledge at this point that he's an ex-felon. That doesn't come until they interview Mr. Ramirez.

THE COURT: I thought at the scene he indicated he, in fact --

MR. LEVINE: Oh, I'm sorry. Are you talking about -- well, yes, but the timing of when they -- they



don't actually come into the house until the second warrant. They tear gas -- all of the facts are not in the stipulated facts, but what happens is -- correct me if I'm wrong -- the -- after the -- after the shots are fired, there's no further effort at entry. There's ultimately more bullhorning and ultimately Mr. Ramirez's wife and his child come out of the house.

The agents don't enter the house. They proceed to tear gas the house for quite a lengthy period of time, because apparently they believe that Mr. Shelby is -- might be in the house. So there's about a two-hour delay. Though Mr. Ramirez is interviewed by Mr. Kim after he comes out of the house and explains what happened and why he shot, and it's that -- at that time, I believe, that Agent Kim learns that Mr. Ramirez is a felon.

So the entry -- the entry into the house does not occur until the second warrant. Now, the agents may believe that there's a gun in the house, since Mr. Ramirez fired a gun, and he also tells them that there was a gun in the house. There's no question that they have -- they have a belief at that point, right from Mr. Ramirez and right from the fact that a gun was fired, that there's a gun in the house. But it wasn't a question of their going in and seeing the gun.

THE COURT: That's not the way I understood the

evidence.

MR. LEVINE: Maybe I have it wrong.

MR. PEIFER: It's in the second search warrant affidavit, which has been incorporated into the entire stipulation, that deputy -- or Detective Green, of the Clackamas County Sheriff's Office, described the gun that was found. Of course, this is before Agent Kim got the second warrant. So that was -- that was done prior to that time and incorporated into the search warrant.

MR. LEVINE: Well, even if -- even if -- even if I have the series of events wrong, even if they saw -- maybe they went in initially and did a quick run-through and saw the gun on the floor, the Court has asked me whether they could seize it. Again -- again, I -- they couldn't seize it because it's ex-felon in possession, because they still don't know he's a felon unless Kim had communicated to them that he was a felon. There's no evidence of that.

If they were charging him with assault on an officer, I suppose a firearm could be evidence of that crime, and they could seize the gun as -- but there never were any charges brought against Mr. Ramirez, and there haven't been to this day. So I think the answer is no, generally speaking, to the question.

With respect to the period of time that



elapsed that Mr. Shelby was on the property -- but this -- this still adds -- still does not suggest that Mr. Shelby -- the fact that he was seen two days on the property does not mean that he's on the residence. Workers, people who are working, laborers, are often on people's property. They simply go home at night and come back to the property during the daytime. We don't assume that laborers are sleeping in the bedroom or in the residence.

The firearm was not in the garage. The firearm was in the utility -- was taken from the utility room, which is next to the garage, but it's not in the garage, as -- the informant had said supposedly they were kept in the garage. That proved not to be the case at all.

THE COURT: Well, the Court will take the matter under advisement, and I'll issue an opinion. I don't recall. Is there a pending trial date in this case?

MR. PEIFER: Yes, Your Honor. I don't have it.

MR. LEVINE: I don't believe there is.

MR. PEIFER: No, there is a date in May. I think it's the third week in May.

THE COURT: It won't take us long. Thank you very much.

(Hearing concluded)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 95-30158

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UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

HERNAN RAMIREZ,

Defendant-Appellee.

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UPON APPEAL FROM THE JUDGMENT OF THE

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

THE HONORABLE ANCER L. HAGGERTY

No. CR 94-379-HA

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# BRIEF OF THE PLAINTIFF-APPELLANT

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## STATEMENT OF THE CASE

A. Jurisdiction, Timeliness and Custody Status

The district court had jurisdiction in this criminal case by virtue of 18 U.S.C. § 3231, while this court's appellate jurisdiction arises under 18 U.S.C. § 3731, governing interlocutory appeals by the United States.

The district court on May 4, 1995, entered an order suppressing evidence (CR 34; ER 71).[1] The government filed a timely notice of appeal on May 11, 1995, including a certification on appeal by the United States Attorney (CR 37-38; ER 73-74).

Defendant has been released on conditions during the pendency of this appeal.

B. Summary of Proceedings

The grand jury indicted defendant for felon in possession of firearms, in violation of 18 U.S.C. § 922(g)(1), based upon his prior convictions of rape by force and violence, burglary of a residence while armed with a firearm, and unlawful use of force upon a peace officer (CR 10; ER 1-2). Defendant filed a motion to suppress evidence, based on alleged lack of probable cause for the search warrant and non-compliance with the knock-and-announce requirement (CR 19-20; ER 3-27). The parties submitted the matter on written stipulated facts (CR 31; ER 51-55), memoranda of law (CR 20, 25, 32; ER 5-27, 28-50, 56-61), and oral arguments

[1] "CR" refers to the Clerk's Record; "ER" refers to the Government's Excerpt of Record; "RT" refers to the Reporter's Transcript of Proceedings.



(RT 2-31). In ordering suppression of evidence, the district court denied defendant's motion on the contention that the search warrant was unsupported by probable cause, but agreed with defendant that violation of the knock-and-announce requirement necessitated suppression (CR 34-35; ER 62-70). This interlocutory appeal by the government followed.

## STATEMENT OF FACTS

The facts adduced for the suppression hearing consisted of (1) the initial search warrant for defendant's residence and its supporting affidavit by Deputy U.S. Marshal Wayne Kauffmann (CR 20, Exh. A; ER 20-17); (2) the second search warrant for defendant's residence and its supporting affidavit by Special Agent George Kim of the Bureau of Alcohol, Tobacco and Firearms (CR 25, Exh. A; ER 42-49), and (3) a written stipulation of facts by the parties (CR 31; ER 51-55). The stipulation and the search warrant documents set forth the following undisputed facts on the knock-and-announce issue:

In the pre-dawn hours of Saturday, November 5, 1994, defendant, his wife Cynthia, and his three-year-old son Christopher were asleep in the residence at 23170 Bohna Park Road in rural Boring, Oregon. The residence has three bedrooms (including a master bedroom), a living room, kitchen, and an attached garage. (A diagram of the property is attached as Appendix A.) This property covers several acres and includes, in addition to the residence, (1) a large workshop building, located about 195 feet south of the main residence (Diagram "E" in

Appendix A); (2) a large travel trailer located about 75 feet west of the workshop (Diagram "F"); (3) a small utility trailer, located about 75 feet from the southwest corner of the residence (Diagram "D"); and (4) a small travel trailer, located immediately adjacent to the east side of the garage (Diagram "C") (ER 51-52).

At about 6:15 a.m., about 45 armed law enforcement officers converged on the property to execute a federal search warrant for the person of Alan Lawrence Shelby. A federal and state fugitive, Shelby had slipped from his handcuffs and struck a deputy sheriff to escape while en route to testify on an associate's behalf in Tillamook County (ER 52). Shelby had a history of escapes, violent conduct, and criminal convictions and had vowed that he would escape again and would not serve time in a federal prison (ER 22, 52). Agents obtained information from a person termed a confidential, reliable informant, that indicated that Shelby had been present on the defendant's property. Other information from the same informant indicated that the defendant himself was possibly involved in drugs, which he kept in the garage. The informant also indicated there were supposed to be several guns in the garage (ER 52).

Shelby's first violent escape was in 1991, when he hit a jailer in the face and kicked out a jail door. He then assaulted a woman, stole her car, and rammed a police vehicle. More recently, while awaiting trial on narcotics and weapons charges, Shelby had attempted a forcible escape by making a rope from bed



sheets and breaking a window. He had also threatened to kill witnesses and officers associated with his incarceration and had brutally tortured others in the past with a hammer (ER 22). As a major methamphetamine manufacturer, Shelby had access to large caches of weapons (ER 23).

The U.S. Marshal sought authorization from the issuing magistrate to serve the search warrant for Shelby at night and to do so without compliance with the knock-and-announce requirement set forth in 18 U.S.C. § 3109. The marshal prepared the warrant with the appropriate language, and the magistrate signed it (ER 52).

Special "SWAT" teams of state, county, and city officers surrounded the property. The Portland Police SWAT team was responsible for clearing and securing the large workshop building, the large travel trailer, and the small utility trailer. The Clackamas County Sheriff's SWAT team was be responsible for securing the garage area of the residence through the east side window and for securing the travel trailer on the east side of the driveway immediately adjacent to the two-car garage (Diagram "C") (ER 52).

Officers entered the unlocked and empty travel trailer in the driveway. While this was occurring, other officers passed the location of the travel trailer to other parts of the property (ER 52-53).

Thereafter, Deputy Barnum broke out the glass of the garage window. While he did so, Sergeant VeraCruz shouted several

times, "Sheriff's Office, Search Warrant," at the window. VeraCruz then began to "gunport" the window, that is, aiming and moving his gun through the window ready to shoot if necessary, but he had trouble when the window's curtain got in his way (ER 53).

At about the same time as this activity at the garage window, an Oregon State Police officer was talking through a portable loud speaker system located at the front of the house. Sergeant Lowe, while at the garage window, was unable to hear what was being announced by the OSP officer because of VeraCruz' yelling. OSP Lieutenant Geistwhite, however, was present in front of the house next to Detective Lockwood and heard him announce over the loudspeaker:

> State Police--search warrant. Attention inside 23170 SE Bohna Park. This is the State Police. All occupants inside 23170 SE Bohna Park, you are instructed to come out the front door now. Do not resist. Have hands on heads. You will not be harmed.

(ER 53).

Inside the residence, defendant and his wife were awakened by outside noises. Neither could determine what the noises were. Defendant then heard the breaking of glass, and he and his wife thought they were being burglarized. Both he and his wife feared for their safety and that of their child who had awakened and was crying. After hearing the glass breaking, defendant ran to the laundry room closet, obtained a pistol, and ran to the entrance of the garage area. In a state of panic, defendant fired toward the ceiling in an effort to scare away the intruders. A fragment



of metal struck VeraCruz in the face causing a slight wound (ER 53).

The law enforcement officers returned fire and simultaneously shouted "police, police." Realizing, for the first time, that law enforcement officers were outside and trying to enter his residence, defendant ran to the living room, threw away the firearm across the floor, and threw himself on the floor in a prone position, shaking from fright. Defendant states that, had he known that the police were trying to enter his home, he never would have fired the weapon. Ultimately, defendant and his wife, who was carrying their child in her arms, walked out of the house and into police custody. Despite a thorough search of the property, the officers did not find Shelby on the premises (ER 53-54).

About 6:35 a.m., ATF Agent George Kim interviewed defendant. After advice and waiver of Miranda rights, defendant admitted he had fired the weapon, that he owned the gun he used as well as another one in the house, and that he was a convicted felon. He said that he had been awakened by noises outside his house and heard the sound of breaking glass. He said he shot up in the air to scare away people he thought were trying to burglarize his home. Because they were asleep, defendant said, neither he nor his wife had heard any announcement of identity by the officers. Shown a picture of Shelby, defendant said that a man with that appearance might have been present on the property two days earlier (ER 54).

Mrs. Ramirez also said that she did not know that the police were trying to enter her home and that she believed she was being burglarized and/or attacked by intruders (ER 54).

Agent Kim used the information furnished by defendant, along with a searching officer's observation of the gun on the living room floor, to obtain another search warrant (attached to the government's memorandum in opposition of defendant's motion to suppress, and incorporated into the stipulation) (ER 42-59, 54). Executing the second warrant, agents reentered the house later the same day and retrieved the pistol on the living room floor and a second one located in a box as defendant had described (CR 31; ER 51-55).

## SUMMARY OF ARGUMENT

Specific, articulable facts created exigent circumstances and justified the officers' non-compliance with the statutory and constitutional knock-and-announce rule. There was probable cause to believe a dangerous escaped federal felon was hiding inside defendant's house. The fugitive had committed several prior forcible escapes, had vowed that he would never serve time in a federal prison, and had access to firearms. Further, there was reason to believe defendant himself kept drugs and guns in his garage. Under the circumstances, it was reasonable and lawful for the officers to break out and "gunport" the garage window before allowing the occupants to respond to the announcement of



Alternatively, any arguable illegality by the police did not require application of the exclusionary rule because of defendant's intervening act of responding with gunfire. His own violent conduct justified police entry, discovery of the firearm, and a second search warrant, thereby purging any alleged taint from non-compliance with the knock-and-announce rule.

## ARGUMENT

### THE DISTRICT COURT ERRED IN SUPPRESSING EVIDENCE FOR NON-COMPLIANCE WITH THE KNOCK-AND-ANNOUNCE RULE.

A. Standard of Review

Suppression for alleged failure to comply with the knock-and-announce requirement is reviewed de novo as a question of law. United States v. Becker, 23 F.3d 1537, 1539 (9th Cir. 1994). Underlying factual findings are reviewed for clear error. Id.

B. Discussion

Defendant sought suppression of the firearms found in his house on three grounds: (1) the alleged failure of the first search warrant's affidavit to establish probable cause that the fugitive Shelby was in defendant's house, (2) failure to comply with the knock-and-announce requirements of 18 U.S.C. § 3109, and (3) improper execution of the warrant in violation of the Fourth Amendment's knock-and-announce rule. The district court rejected defendant's probable cause argument but suppressed on the ground that there was insufficient exigency to justify the officers' breaking a garage window before complying with the knock-and-

announce rule. The court erred in that holding. Further, the court erred in rejecting the government's alternative argument that, even assuming unlawful conduct, the exclusionary rule should not apply because of defendant's intervening gunfire.

1. Exigent Circumstances Justified the Officers' Breaking the Garage Window Before Waiting for the Occupants to Respond to the Announcement.

Officers serving a search warrant at a house ordinarily must announce the authority under which they are acting and the purpose of the call. If they are refused admittance to the premises after the announcement, they may enter forcibly. 18 U.S.C. § 3109; United States v. Woodring, 444 F.2d 749 (9th Cir. 1971). Courts relax these requirements, however, when exigent circumstances make observance of the statute inappropriate. See United States v. Turner, 926 F.2d 883, 886-87 (9th Cir.), cert. denied, 502 U.S. 830 (1991). Here, the officers announced their identity and purpose but, for safety reasons, did so as they broke the garage window and thus did not wait for the occupants to respond. Their actions were nonetheless reasonable and lawful under all the circumstances.

The most recent case in the Ninth Circuit on the subject of forced entry is United States v. Becker, 23 F.3d 1537, 1541 (9th Cir. 1994), where the court held that "mere unspecific fears" about peril to officers do not justify relaxation of the rule. Becker discussed a two-tiered approach to exigency. Citing United States v. McConney, 728 F.2d 1195, 1206 (9th Cir. 1984)



(en banc), the court stated that "even mild exigency, like knowledge that a person is dangerous, can justify immediate entry where that can be done without any physical destruction of property." Becker, 23 F.3d at 1540. See also United States v. Arias, 923 F.2d 1387, 1391 (9th Cir. 1991). To justify physical destruction of property (as occurred here), "[m]ore specific inferences of exigency are necessary." Becker, 23 F.3d at 1541 (quoting McConney, 728 F.2d at 1206).

Ninth Circuit decisions have further demonstrated the types of circumstances that do not justify forced entry. In United States v. Mendonsa, 989 F.2d 366, 370-71 (9th Cir. 1993), there was insufficient exigency based merely on the occupant's prior armed robbery conviction, a little noise inside the house, and the "inherently dangerous job of arresting drug dealers." Officers in United States v. Moreno, 701 F.2d 815, 817-18 (9th Cir. 1983), vacated on other grounds, 469 U.S. 913 (1984), the court held that feared destruction of evidence, just because there was "always" a danger in drug cases, was not an adequate reason for forced entry. Although officers in United States v. Fluker, 543 F.2d 709, 717 (9th Cir. 1976), believed an occupant owned a gun and there was a general fear that narcotics might be destroyed, there was insufficient exigency. Finally, in Becker, there was no exigency based on a generalized fear that the homeowner might be dangerous and that a methamphetamine laboratory might be on the premises.

The highly specific facts indicating dangerousness in the present case stand in sharp contrast to the "generalized fears" and skimpy facts outlined in the above decisions. The district court correctly stated in its probable cause holding that there was ample reason to believe the fugitive Alan Lawrence Shelby was present at defendant's house. As set forth in detail in the search warrant affidavit (ER 20-27), Shelby had a history of escapes and assaultive behavior. A few days earlier, he had escaped from a deputy sheriff by slipping out of handcuffs, striking the deputy and knocking him down. Shelby was serving long federal sentences for manufacturing methamphetamine and use of a firearm during a crime, concurrently with a state sentence for armed robbery at the Oregon State Penitentiary. Shelby had accurately predicted he would escape from a transport van if given the opportunity and vowed he would "not do federal time" (ER 22).

In 1991 Shelby struck a corrections officer in the face and kicked out a jail door. While fleeing the jail, he assaulted a woman, stole her vehicle, and then rammed a police vehicle. While awaiting trial on narcotics and weapons charges in Eugene, Shelby attempted a jailbreak by constructing a rope from torn bed sheets and breaking a window (ER 22). He had threatened to kill witnesses and police officers associated with his incarceration. Also, Shelby had used a hammer brutally to torture people. A major methamphetamine manufacturer, he had access to large caches of weapons (ER 22-23).



For these very specific and detailed reasons, the officers considered Shelby to be an extreme danger to their safety. There was every reason to believe he would not submit peaceably to their authority but would, as usual, react violently. "Armed and dangerous" understates his status and the peril faced by law enforcement officers in attempting to recapture him. Also, the officers had information that defendant himself kept drugs and guns in the garage, which his later violent reaction confirmed (ER 52). The officers thus had a highly persuasive basis for non-compliance with the knock-and-announce rule. This case presents precisely the type of exigent circumstances contemplated by Becker to justify forced entry without waiting for dangerous occupants to respond to the officers' announcement.

In addition to his argument under 18 U.S.C. § 3109, defendant contended -- and the district court agreed -- that the officers' actions were unreasonable under the Fourth Amendment. There is no authority for the proposition that the federal constitution provides broader protection or a stricter knock-and-announce rule than that of § 3109 in federal cases, and the district court did not so hold. Rather, it appeared to treat them as synonymous (ER 70, 71).

In the recent case of Wilson v. Arkansas, 115 S. Ct. 1914 (1995), the Court held that whether officers knock and announce their presence and authority before entering a dwelling, as required by common law, is a factor to be considered in determining the reasonableness of a search under the Fourth

Amendment. While confirming the incorporation of the common-law rule into the Fourth Amendment, the Court nonetheless stressed the age-old exception that "the presumption in favor of announcement would yield under circumstances presenting a threat of physical violence." Id., 115 S. Ct. 1918-19 (citations omitted). That, of course, was precisely the situation presented here, and the officers responded reasonably by breaking out the window simultaneously with their announcement to the occupants. Without cataloging all the relevant countervailing factors, the Supreme Court in Wilson simply held that, "although a search or seizure of a dwelling might be constitutionally defective if police officers enter without prior announcement, law enforcement interests may also establish the reasonableness of an unannounced entry." Id. at 1919. Here, the same demonstrated exigencies that sufficed to excuse § 3109 compliance also met the Fourth Amendment reasonableness test.

The magistrate's endorsement of a "no-knock" clause in the first warrant, while not explicitly authorized by statute, in no way illegitimized the officers' conduct. If anything, the endorsement manifested their good faith in submitting the matter to judicial analysis prior to the warrant's execution. It certainly did not affect the legality and constitutionality of the forced entry, which passes muster under the objective exigency test discussed above.



2. In the Alternative, Defendant's Intervening Gunfire Makes Application of the Exclusionary Rule Inappropriate.

The government's primary position, both on appeal and in the district court, is that a specific showing of exigency excused compliance with the knock-and-announce rule. Even assuming, arguendo, that position is incorrect, it does not follow that the court must exclude evidence of the two firearms forming the basis for defendant's indictment. Rather, defendant's intervening act of firing his weapon renders the exclusionary rule inapplicable to the firearms since they were not "fruit of the poisonous tree."

Wong Sun v. United States, 371 U.S. 471, 487-88 (1963), the seminal case in the field, described the limitations of the exclusionary rule:

> We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is whether, granting establishment of the primary illegality, the evidence to which instant objection is made was come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.

There is a body of law holding that, when a person subjected to an allegedly illegal search or arrest responds with force against the officers, resulting evidence is not fruit of the poisonous tree. See 4 La Fave, Search and Seizure: A Treatise on the Fourth Amendment § 11.4(j) (2d ed. 1987 and 1994 Supp.). Here, the discovery and ultimate seizure of the firearms (under a

second search warrant) resulted from defendant's use of force against the officers, not from any exploitation of what defendant asserts was illegal activity.

Several federal cases illustrate this point. In United States v. King, 724 F.2d 253 (1st Cir. 1984), the court assumed, without deciding, that the officers committed some illegality in attempting to search defendant, but he responded by shooting at them. "We believe the shooting was an independent intervening act which purged the taint of the prior illegality," the court stated. Id., 724 F.2d at 256. King cited favorably United States v. Bailey, 691 F.2d 1009 (11th Cir. 1982), cert. denied, 461 U.S. 933 (1983), and United States v. Nooks, 446 F.2d 1283 (5th Cir.), cert. denied, 404 U.S. 945 (1971), where the courts admitted evidence discovered when an illegal stop was interrupted by a defendant's flight. "In each case the search was in progress when flight occurred. In each case the court held that the flight constituted an intervening act which provided probable cause for the ultimate search." King, 724 F.2d at 256.

United States v. Waupekenay, 973 F.2d 1533 (10th Cir. 1992), reached the same result for a different reason. Defendant in that case pointed a gun at the police after they had illegally entered his premises. The court held:

> We conclude that Mr. Waupekenay did not have a legitimate reasonable expectation of privacy when he initiated criminal activity--assault--in the presence of the police officers within the trailer. Once Mr. Waupekenay was aware that the police officers were present in his home and were observing him, he could not have had a reasonable



> expectation of privacy for any actions initiated subsequently to that time in their presence. He obviously intended for the police to see him aim a semi-automatic weapon at them. Thus he could not have had a legitimate expectation of privacy in that action.
>
> . . . .
>
> Our decision is consistent with the holding of many other courts, state and federal, that have considered situations in which a defendant seeks to suppress evidence relating to his or her violence or threatened violence toward police officers subsequent to an unlawful search or seizure or a warrantless entry. In assault, resisting arrest, disorderly conduct, and weapons related trials, these courts have uniformly rejected motions to suppress arising from skirmishes comparable to the one at issue in the instant case . . . .

Id., 973 F.2d at 1537 (citations omitted). In addition to King and Nooks, the court in Waupekenay cited 13 other state and federal cases supporting its holding in similar contexts.

Among the many state court opinions on this issue, Illinois v. Villarreal, 152 Ill. 2d 368, 604 N.E.2d 923, 178 Ill. Dec. 400 (1992), deserves mention. The Illinois Supreme Court held that defendants were precluded from resisting the police officers' attempt to enter a house to arrest a third party, regardless of whether the police actions would have been legal. The exclusionary rule cannot be applied to suppress actions directed against the police, even when the police illegally enter a defendant's home to arrest another person. Id., 604 N.E. 2d at 927.

Here, defendant responded to the officers by firing his pistol from his home. His intervening action created an independent basis for what followed, namely, his removal from the house, his questioning (with admissions of gun ownership and felon status), and seizure of the firearms pursuant to a second search warrant. Even if there were arguable illegality in the initial police conduct, all the intervening events occasioned by defendant's armed resistance (including the seizure of the guns) are not subject to the exclusionary rule.

CONCLUSION

For the above reasons, the district court's order suppressing evidence should be reversed and the case remanded for trial.

DATED this 14th day of August, 1995.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 95-30158

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

HERNAN RAMIREZ,

Defendant-Appellee.

UPON APPEAL FROM THE JUDGMENT OF THE

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

THE HONORABLE ANCER L. HAGGERTY

No. CR 94-379-HA

# REPLY BRIEF OF THE PLAINTIFF-APPELLANT

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## ARGUMENT NO. I

### THE OFFICERS HAD AMPLE INFORMATION TO JUSTIFY THEIR BREAKING A WINDOW TO OBTAIN ENTRY TO THE HOUSE AT THE SAME TIME THAT THEY ANNOUNCED THEIR PRESENCE.

Both defendant and the district court err in their contention that the officers lacked sufficient information to justify breaking the garage window simultaneously with their announcement of presence. Unlike United States v. Becker, 23 F.3d 1537, 1541 (9th Cir. 1994), where "there was no specific information that Becker himself was armed or dangerous," here the information amply demonstrated both.

Alan Lawrence Shelby was an escapee who had already engaged in violence in effecting his most recent escape; he had a prior record of using violence in escaping; he was serving time for a firearms offense and a dangerous drug crime; he had a reputation for violence against people who got in his way; through his methamphetamine connections, he had access to firearms; and, last but not least, he had boasted that he would not do time in a federal prison. Also, there were grounds to believe defendant kept guns and drugs in the attached garage, the focus of the officers' concern. Against this background, it borders on the absurd to contend that the officers were not in specific danger and that they could only enter the house unannounced if they found an open door or window.

Defendant and the district court seem to rest their position on the absence of an eyewitness actually seeing Shelby in possession of a firearm. Becker certainly imposes no such

requirement, however. Instead, Becker requires "specific information" to believe an occupant is armed or dangerous. Id. at 1541. The information at hand more than met that burden. A reasonable person could easily infer from the specific information that Shelby was dangerous, armed, and likely to respond with violence to any attempt to arrest him.

Under the circumstances, securing the garage first was a sensible plan fully supported by reason and common sense. The officers reasonably feared a violent response, and they took careful, limited measures to meet that threat. What were their alternatives? One alternative could have been to knock, announce, and wait for a response, which could well have been Shelby firing at them in the dark. Another alternative could have been searching (probably in vain) for an unlocked door, entering unannounced, and facing a fate worse that what actually occurred. Or, they could have broken down doors with perhaps an even worse result.

In fact, the officers' intrusion was minimal. Again in contrast to Becker, they did not break down any doors or engage in extensive destruction of property as part of their plan. Instead, they broke a single window in the garage. (Later, unplanned damage occurred only in response to defendant's gunfire.)

The district court's decision is perplexing. Under its decision, officers who have strong reason to believe they face a dangerous situation in executing a warrant may open an unlocked



door and enter a house, but they may not break open a window, much less break down a door. That rule does not protect the officers, because it is fortuitous whether they will find an open door, and it does little to further the Fourth Amendment rights of the occupants, because in both cases the officers have entered the house without knocking and announcing their presence.

The Supreme Court has ruled that "it is generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by a warrant -- subject of course to the general Fourth Amendment protection 'against unreasonable searches and seizures.'" Dalia v. United States, 441 U.S. 238, 257 (1979). The officers' actions here were entirely reasonable in view of the demonstrated and serious threat to their safety in arresting a dangerous, even crazed, felon.

## ARGUMENT NO. II

## ASSUMING AN UNJUSTIFIED KNOCK-AND-ANNOUNCE VIOLATION, DEFENDANT'S GUNFIRE WAS AN INTERVENING ACT RENDERING THE EXCLUSIONARY RULE INAPPLICABLE.

Defendant's act of shooting from his house at the officers supplied an intervening event that broke the chain of causation between the asserted Fourth Amendment violation and the receipt of the guns. The government's position regarding this issue is fully discussed in its opening brief and need not be restated here. Defendant's principal reply is that, because he did not know he was shooting at the police, there was no attenuation of the alleged taint. That really misses the point, however.

The pertinent issue is whether there was an independent intervening act that, in effect, justified the subsequent police conduct of entering defendant's house and obtaining a second search warrant for the guns. What defendant knew, thought, or intended does not change the fact that he initiated gunfire which broke the earlier chain of causation between the asserted Fourth Amendment violation and the receipt of the guns.

Furthermore, the asserted police error in this case, even more than in the typical case of a knock-and-announce violation, had no causal link to the receipt of evidence. That is because the court below (following the magistrate who authorized an unannounced entry) found that an unannounced entry was justified; it was merely the breaking of the garage window as part of that entry that was not. The exclusionary rule should not apply to such an alleged violation, particularly when the police are met with gunfire.

Stated another way, the privacy interests protected by the knock-and-announce rule were validly compromised, as both the district court and the magistrate indicated, with a warrant that itself authorized a no-knock entry. The only violation was to the property interests served by the rule (i.e., the broken pane of glass). There is no causal connection between the property violation and the fruits of the search, except in the most attenuated sense, most especially after defendant himself initiated the gunfire.



## ARGUMENT NO. III

### THE DISTRICT COURT CORRECTLY HELD THAT THERE WAS PROBABLE CAUSE SUPPORTING THE SEARCH WARRANT FOR THE FUGITIVE AT DEFENDANT'S HOUSE.

Defendant's alternative argument, that the initial search warrant lacked probable cause to believe the fugitive Shelby was present at defendant's house, was correctly rejected by the district court.

The law has long recognized a preference for warranted rather than warrantless searches, and thus the magistrate's determination of probable cause is paid great deference by reviewing courts. Spinelli v. United States, 393 U.S. 410, 419 (1969); United States v. Ventresca, 380 U.S. 102, 109 (1965). Affidavits are to receive a reading based on reason and common sense, without the application of a hypertechnical standard of review.

> . . . [T]he Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract. If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants must be tested and interpreted in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no place in this area. A grudging or negative attitude toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting.

Id., 380 U.S. at 108.

According to Illinois v. Gates, 402 U.S. 213, 236 (1983), after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of de novo review. Rather,

the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis" for the probable cause finding. Id. (quoting Jones v. United States, 362 U.S. 257, 271 (1960)); United States v. Di Cesare, 766 F.2d 890, 896 (9th Cir. 1985). Probable cause does not demand a showing that the belief be correct or more likely true than false. United States v. Murray, 751 F.2d 1528, 1532 (9th Cir. 1985). A practical, non-technical probability that contraband or other criminal evidence (or, in this case, the fugitive Shelby) will be found in a particular place is all that is required. Texas v. Brown, 460 U.S. 730 (1983); United States v. Seybold, 726 F.2d 502, 503-504 (9th Cir. 1984).

Under these standards, the search warrant affidavit contained more than adequate probable cause to believe Alan Lawrence Shelby was present in defendant's property, including inside his house, on November 5, 1994. A confidential, reliable informant told ATF Special Agent Kim that he had seen a man named "Alan" at the residence who made the approximate statement, "I had to knock out a guard." The informant made the connection between "Alan" and Shelby when he read an article about the escape. Kim already considered the informant reliable based on earlier correct information he had provided, including facts that had led to the arrest of another fugitive felon.

Kim drove the informant near the house, and they saw a man they believed to be Shelby washing a car outside defendant's house. Kim found the man to be "very similar" to a photograph of



Shelby, and the informant said he was the same man he had previously seen at the residence (who was named "Alan" and said, in effect, he had had to "knock out a guard"). Kim was close enough to see what "Alan" was wearing and that he was "clean cut."

Deputy U.S. Marshal Wayne Kauffmann, the affiant for the search warrant, drove by the residence as well. In addition to viewing the house and numerous outbuildings on the 10-acre parcel, Kauffmann saw a man resembling "Alan" come out of the house, but because of the distance he could not make a positive identification. Like Kim, however, Kauffmann was close enough to make out the man's clothing and "clean cut" appearance.

Viewed in a common-sense and realistic fashion under the totality of the circumstances, the affidavit established a "substantial basis" for the magistrate to find that Alan Lawrence Shelby probably would be found in defendant's house. The reliable informant's first-hand information about "Alan," who said, in effect, that he had knocked out a guard, coupled with the corroborative observations of Kim and Kauffmann, persuasively established Shelby's presence at the location shortly before the warrant issued. The magistrate reasonably inferred from the facts that Shelby likely was staying there, so he would be found in the residence itself.

Defendant's argument against probable cause is the same timeworn, hypertechnical approach to search warrant analysis that federal courts have uniformly rejected. To posit, as defendant

did in the district court (ER 10), that the remark about having to "knock out a guard" might refer to playing touch football is directly contrary to the requirement that affidavits be interpreted in a commonsense and realistic fashion. The same is true of his criticisms of the affidavit for not listing "Alan's" identifying characteristics and not establishing his identity with a higher degree of certainty. Probable cause does not demand certainty or correctness, only a "substantial basis for belief." That standard was more than adequately met here, and this court should not disturb the magistrate's finding.

The evidence, however, is admissible irrespective of whether probable cause supported the warrant. Under the "good faith" rule of United States v. Leon, 468 U.S. 897 (1984), and Massachusetts v. Sheppard, 468 U.S. 981 (1984), the Fourth Amendment exclusionary rule is inapplicable when officers have acted in reasonable reliance on a judicially issued warrant. There are only four circumstances under which the good faith exception does not apply, and none of those circumstances is present here: (1) if the warrant is based on a "bare bones" affidavit "so lacking in evidence of probable cause as to render official belief in its existence entirely unreasonable"; (2) if the warrant is based upon deliberate or reckless material misrepresentations by the affiant; (3) if the issuing magistrate has wholly abandoned the required neutral and detached judicial role; or (4) if the warrant's particularization of the place to be searched or the items to be seized is "so facially



deficient . . . that the executing officers cannot reasonably presume it to be valid." Leon, 468 U.S. at 923; see United States v. Michaelian, 803 F.2d 1043, 1046 (9th Cir. 1986). Defendant has not alleged, and cannot prove, any of these factors.

## CONCLUSION

For the above reasons and all those discussed in the government's opening brief, the suppression order of the district court should be reversed and the case remanded for trial.

DATED this 16th day of October, 1995.

Respectfully submitted,

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Stephen F. Peifer

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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UNITED STATES OF AMERICA,

Appellant

v.

HERNAN RAMIREZ,

Appellee

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

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# PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

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## STATEMENT OF COUNSEL

In this case, a divided panel held that police officers violated the Fourth Amendment and the federal knock-and-announce statute when they broke a single window in the course of executing a warrant to search for a violent, potentially armed, escaped convict. By any standard, the officers acted reasonably, and the majority erred by second guessing the officers' determination, which had been validated by a federal magistrate judge in a "no-knock" warrant, that they faced circumstances allowing them to dispense with the requirement that they announce their presence before entering the dwelling. Rehearing en banc is warranted not only to correct the majority's erroneous decision, but also because, as both the majority and the dissent acknowledged, this Court's cases do not provide consistent guidance on the question when sufficient exigency exists to justify dispensing with the

announcement requirement.

**QUESTION PRESENTED**

Whether police officers violated the Fourth Amendment and 18 U.S.C. § 3109 by breaking a window of the defendant's garage while executing a "no-knock" warrant to search for a violent and potentially armed escaped convict.

**STATEMENT**

1. The Affidavit and the No-Knock Warrant: On November 1, 1994, while en route to testify at a state criminal trial, Alan Lawrence Shelby, a prisoner serving time for federal drug and firearms violations and on a state armed robbery conviction, slipped out of his handcuffs, assaulted a deputy sheriff, and escaped. On November 4, 1994, Deputy U.S. Marshal Wayne Kauffmann applied for a warrant to search defendant Ramirez's residence for Shelby. The affidavit in support of the application recounted that a previously reliable confidential informant had seen a person believed to be Shelby at Ramirez's residence in Boring, Oregon. The affidavit stated that the person had been introduced to the informant as "Alan" and had stated, "I had to knock out a guard" in the informant's presence. According to the affidavit, after receiving this information, an Kauffmann and an ATF agent had separately driven by Ramirez's residence and seen a man resembling Shelby. ER 23-24.

The affidavit also recounted that Shelby "had a history of violent escapes" and that he had stated that he would not "'do federal time.'" According to the affidavit, Shelby had attempted



to escape from custody in 1991 "by striking a corrections officer in the face and kicking out the door of the jail. Shelby ran from the jail and assaulted a woman in a parking lot and stole her vehicle. During the escape attempt, Shelby rammed a police vehicle with the stolen vehicle." The affidavit further stated that Shelby "has made threats to kill witnesses and police officers associated with his incarcertion" and that he "has brutally tortured others in the past with a hammer." Finally, the affidavit stated that Shelby "was a major Methamphetamine manufacturer and has had access to large caches of weapons." ER 21-22.

Based on the information in the warrant, a magistrate judge issued a warrant to search Ramirez's residence for Shelby. At Deputy Marshal Kauffmann's request, the magistrate included the following provision in the warrant: "because of exigent circumstances shown in the application, you are authorized to enter the premises without complying with the Knock-and-Announce requirement." ER 24.

2. The Search of Ramirez's Residence: Prior to executing the warrant, the officers received information from the informant that Ramirez might be storing several guns in his garage. ER 52, 67-68. On November 5, 1994, at about 6:15 a.m., about 45 law enforcement officers surrounded Ramirez's house. Through a loudspeaker, a police officer announced the officers' presence and ordered the occupants of the building to come out. At the same time, a police officer broke open the window of the garage, while another officer shouted "Sheriff's Office, Search Warrant." ER 53.

Awakened by the police activity, Ramirez initially thought that his house was being burglarized. He ran to a closet, grabbed a gun, and fired it into the ceiling. A short time later, Ramirez realized that the police had surrounded the house and surrendered. After receiving and waiving his Miranda rights, Ramirez admitted that he was a convicted felon and that he owned the gun that he had fired as well as another one. Ramirez further admitted that a man resembling Shelby had been at his house two days earlier. Based on Ramirez's statement and the officers' observation of the gun Ramirez had fired, the officers obtained another warrant and seized the two firearms.

3. The District Court's Decision: Ramirez was charged with possession of a firearm by a convicted felon. He moved to suppress the firearms seized from his house, and the district court granted the motion. ER 62-72. Initially, the court found that the government had presented probable cause sufficient to justify the issuance of the search warrant. The court found, however, that the officers had violated the federal knock-and-announce statute, 18 U.S.C. § 3109, by breaking the window of Ramirez's garage as they announced their presence. The court acknowledged that "there were specific facts known regarding Shelby's propensity to attempt escape, his disdain for federal incarceration, and his past willingness to use threats and violence as a means of intimidation." ER 68-69. It found, however, that the officers had shown insufficient exigenct circumstances because "there was no information that [Shelby] was armed and dangerous at defendant's home, or



that he would present any specific dangers to arresting officers if found there." ER 68-69.

4. The Panel Decision: A divided panel of this Court affirmed the district court's suppression order.[1] The majority employed a two-tier analysis drawn from United States v. Becker, 23 F.3d 1537 (9th Cir. 1994), in which a "mild exigency" justifies an unannounced entry "that can be done without any physical disruption of property" and "more specific inferences of exigency are necessary" to justify the physical destruction of property. The majority held that a sufficient level of exigency had not been shown here based on the following analysis:

> The 45 officers did not fear any of the actual residents of the house and were not attacking a gang or cult hangout where they might be met by a fusillade of gunfire. They were concerned about one person, Shelby, who might be on the premises. But Shelby was not known to have ever shot or shot at anyone. He was an escape artist, who said he would not go to federal prison. He had knocked people down in his escape attempts, and he had stolen a car and run into a police vehicle. His violence toward law enforcement had not extended beyond that, even though he had obviously been arrested on some occasions. Perhaps his degree of dangerousness bespoke a mild exigency. Certainly it did not bespeak more.

Slip op. 9465. The court also found a lack of specific evidence that Shelby was armed or that "when he was faced with [a] show of force he would do anything violent at all." Id. at 9467.

The majority then held that the illegal entry to the home required the suppression of the seized firearms. The court found that the "seizure of the guns * * * came as the most direct, if not the only, result of the" police "break-in." It rejected the

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[1] A copy of the panel decision is appended to this petition.

government's argument that Ramirez's firing of the pistol into the ceiling was an "intervening event" that broke the causal chain between the police entry and the seizure of the firearm.

Judge Kozinski dissented. He argued that the majority opinion "opens a square conflict with United States v. Turner, 926 F.2d 883 (9th Cir.), cert. denied, 502 U.S. 830 (1991)." Using a chart, Judge Kozinski then explained that in Turner on facts identical or less compelling than those presented here, the court had upheld a forcible, unannounced entry into a residence to execute a warrant. Judge Kozinski emphasized Shelby's history of violence and noted that the majority "tr[ies] to duck Turner by claiming that our cases 'graph a complex curve.'" Slip op. 9475 (quoting majority op. at 9467). He responded, "But if the law is in that much turmoil, we must call for sua sponte en banc." Slip op. 9475.

Judge Kozinski also argued that "[e]ven had the no-knock search been illegal, this would provide no grounds for suppression of the evidence pertaining to Ramirez." He asserted that the majority opinion raised intra-circuit conflicts on this issue as well. Slip op. 9477 (citing United States v. Jones, 608 F.2d 386 (9th Cir. 1979), and United States v. Garcia, 516 F.2d 318 (9th Cir.), cert. denied, 423 U.S. 934 (1975)). According to the dissent, suppression was not required because "police couldn't possibly be deterred by the threat of exclusion of evidence relating to a completely different person and crime" and because Ramirez's firing of the gun was an intervening act that dispelled the taint of any official illegality. Slip op. 9478-79.



**REASONS FOR GRANTING THE PETITION**

The majority held that the officers' breaking of a single garage window as they announced their presence while executing a search warrant for a violent escapee violated the Fourth Amendment and the federal knock-and-announce statute. The majority reached that conclusion based on its own detached and exacting assessment of the circumstances facing the officers. Measured against the reasonableness requirement of the Fourth Amendment, however, the officers acted properly when confronted with a violent and dangerous drug dealer.

The majority's conclusion creates a conflict with prior decisions of this Court and exacerbates the confusion in this Court's cases. Moreover, the current state of the law in this Circuit leaves police officers in the field with little guidance in an area where they are required literally to make life and death decisions. Accordingly, rehearing en banc is warranted.

1. In Wilson v. Arkansas, 115 S. Ct. 1914, 1918 (1994), the Supreme Court held that "in some circumstances an officer's unannounced entry into a home might be unreasonable under the Fourth Amendment." The federal knock-and-announce statute, 18 U.S.C. § 3109, prohibits an officer from breaking into a house unless "after notice of his authority and purpose, he is refused admittance." As the Supreme Court explained in Wilson, however, "the Fourth Amendment's flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests." 115 S. Ct. at

1918. Instead, "the presumption in favor of announcement would yield under circumstances presenting a threat of violence." Ibid. Likewise, this Court has held that "a police officer's 'reasonable belief that announcement might place him or his associates in peril * * * justifies non-compliance with the announcement provisions'" of Section 3109. United States v. Manfredi, 722 F.2d 519, 524 (9th Cir. 1983) (quoting United States v. Kane, 637 F.2d 974, 978 (3d Cir. 1981)).

Thus, under both the Fourth Amendment and Section 3109, an officer may make an unannounced entry into a dwelling if he reasonably believes that announcing his presence would create a danger to himself or others. Here, the officers plainly acted reasonably. At the time that they executed the warrant, they had the following information concerning Shelby: (1) Shelby had been convicted of drug and firearm offenses and of armed robbery; (2) he had escaped from custody by assaulting a police officer; (3) three years earlier, he had attempted to escape by assaulting a corrections officer and a bystander and by using a stolen car to ram a police car; (4) he had stated that he would not "do federal time"; (5) he had threatened to kill witnesses and police officers associated with his incarceration; (6) he had "brutally tortured others in the past with a hammer"; and (7) he had access to firearms.

In addition, the officers had received information that Ramirez kept firearms in the garage. Finally, the officers had presented the facts concerning Shelby's violent conduct to a federal magistrate judge, who had authorized them to dispense with



the announcement requirement. In short, according to undisputed evidence, the officers had probable cause to believe that they were executing a warrant at a house containing a man convicted of two offenses involving firearms, who had vowed not to serve federal prison time, who had a proven history of violent escapes and a reputation for psychotic violence, and who had might have access to firearms in Ramirez's house.

Any reasonable officer would have feared for his safety under these circumstances. Thus, these officers acted reasonably in causing a minimal degree of property damage to secure Ramirez's home. Indeed, the Supreme Court in Wilson expressly found that forcible entry is justified in precisely this situation. The Court held that "it would be a 'senseless ceremony' to require an officer in pursuit of a recently escaped arrestee to make an announcement prior to breaking the door to retake him." 115 S. Ct. at 1919 (citation omitted). Thus, the officers in this case would have been justified in using far more force in entering Ramirez's dwelling. Instead, they confined themselves to breaking a single window in the part of the house thought to contain firearms. The intrusion on Ramirez's privacy and property interests was minimal and tailored to the officers' legitimate safety concerns.

The majority's conclusion that the police lacked sufficient grounds for breaking the window trivializes the danger the officers faced and second guesses a commonsense law enforcement judgment. The majority reasoned that "Shelby was not known to have ever shot or shot at anyone." A reasonable person does not need evidence

to force open a door when police knew the defendant was likely to be armed, had a violent criminal record, and associated with another violent criminal. Again, police had at least as much specific information that Shelby presented a threat of violence.

Similarly, in United States v. Ramirez, 770 F.2d 1458, 1461 (9th Cir. 1985), an FBI agent kicked down a door of a residence while executing an arrest warrant. This Court found sufficient exigent circumstances to justify this level of property destruction based on information that the defendants were suspects in a murder, were considered armed and dangerous, and knew that the FBI was looking for them. The Court did not require the kind of specific information that the defendants would use force to resist arrest that the Court believed was necessary in this case.

Thus, it is an understatement to state, as the majority does, that this Court's cases "graph a complex curve." In fact, the Court's cases can only leave law enforcement officials guessing concerning decisions that they must often make at the spur of the moment under highly dangerous and stressful circumstances.

The principal source of the confusion is the Court's rigid two-tier approach to the question whether exigent circumstances justify an unannounced entry. Under that test, a "mild exigency * * * can justify immediate entry when that can be done without any physical disruption of property," but "more specific inferences of exigency" are necessary to "justify physical destruction of property." See United States v. Becker, 23 F.3d at 1540. Here, for example, the majority concluded, "Perhaps [Shelby's] degree of

dangerousness bespoke a mild exigency. Certainly, it did not bespeak more."

This approach is unworkable. Police officers are not equipped to judge in the heat of executing a search warrant whether they confront a "mild exigency" or a not-so-mild one. Nor do officers know when they execute a warrant whether they will find an open door, which they can proceed through if they have a mild exigency, or a locked door that requires something more. Police officers should not have to compromise their safety because they encounter a locked door or window while conducting an otherwise valid search. Nor should the validity of a search depend on the fortuity of whether the officers find an opened or locked door. Indeed, the result in this case would have been different if the officers had found a garage window or door open at Ramirez's residence.

Moreover, the Court's two-tier approach unreasonably requires an increased showing of exigency whenever police officers cause property damage in executing a warrant. First, that requirement fails to recognize that in this day and age, the vast majority of people -- and certainly the vast majority of wrongdoers -- lock the doors and windows of their dwellings. Second, under the Court's approach police officers act equally unreasonably if, lacking "specific inferences of exigency," they breach a house's walls or, as in this case, they break the window of a room that may contain firearms. Instead of according dispositive significance to this factor, the extent of property damage should be considered as a single factor in the "reasonableness" balancing test required by



the Supreme Court's decision in Wilson. See Wilson, 115 S. Ct. at 1919; see also Bodine v. Warwick, 72 F.3d 393, 398 (3d Cir. 1995) (Wilson adopts an overall standard of reasonableness that considers exigency as a single factor). Put another way, either the police reasonably believe that the element of surprise is needed to avoid risk to their safety -- and may thus use appropriate force to effect an entry -- or they do not.[3]

3. The majority also erred in concluding that a violation of the announcement requirement requires suppression of the two fire-arms seized from Ramirez's house. As the Supreme Court has reiterated, "the issue of exclusion is separate from whether the Fourth Amendment has been violated, and exclusion is appropriate only if the remedial objectives of the rule are thought most efficaciously served." Arizona v. Evans, 115 S. Ct. 1185, 1192-93 (1995) (emphasis added) (citations omitted).

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[3] The Court's standard diverges from Wilson in another respect. The heightened standard of exigency necessary to justify property damage in executing a warrant appears to equal the showing of exigency necessary to make a warrantless entry into a home. To make an unannounced entry pursuant to a warrant, however, officers need not show the same level of "exigent circumstances" necessary to make a wholly warrantless entry into a dwelling. When officers rely on the "exigent circumstances" doctrine to enter a dwelling, they must show circumstances that justify dispensing with the requirement of a warrant altogether. See Payton v. New York, 445 U.S. 573, 585-86 (1980); Vale v. Louisiana, 399 U.S. 30, 34-35 (1970). By contrast, when officers have obtained a warrant, a neutral and detached magistrate has determined that probable cause exists to enter and search a dwelling. Thus, the magistrate has authorized the intrusion into the residence, and the question is only whether it would be "reasonable" within the meaning of the Fourth Amendment to dispense with the knock-and-announce requirement. It stands to reason that an unannounced entry pursuant to a warrant may be "reasonable" under circumstances that would not justify a wholly warrantless entry into a dwelling.

Suppression is not required in this case for three reasons. First, a magistrate judge had authorized the officers to dispense with the knock-and-announce requirement. Although the magistrate judge did not specifically authorize the officers to break Ramirez's window, the officers reasonably could have assumed that they were entitled to use an appropriate level of force to effect the unannounced entry. When, as here, police officers act in good faith reliance on the judgment of a neutral and detached magistrate, suppression will have no deterrent effect on police conduct. See United States v. Leon, 468 U.S. 897, 920-21 (1984) (when police obtain a warrant, "there is no police illegality to deter"). It is worth noting in this respect that even if the officers should not have broken the window, their overall conduct was reasonable: they announced their presence over a loudspeaker, they broke only the window in a garage thought to contain firearms, and they obtained a second warrant to seize the firearms.

Second, as this Court has held, "[d]eterrence can have its effect only when it can be said that an object of the illegal conduct was the securing of the evidence sought to be suppressed." United States v. Jones, 608 F.2d 386, 391 (9th Cir. 1979). Here, the object of the illegal conduct identified by the panel majority was securing Ramirez's garage to ensure that Shelby did not obtain access to weapons. Because the officers were not seeking evidence against Ramirez when they executed the warrant, there will be no deterrent effect, and the majority's contrary conclusion conflicts with Jones.



Third, the police learned of and seized Ramirez's firearms only because he discharged one of them when the police attempted to execute the search warrant. As Judge Kozinski, explained, "[b]ecause Ramirez's intervening act [of firing the gun] was not 'the intended result of illegal police conduct, * * * it attenuates the alleged taint from the no-knock entry." Slip op. 9479 (quoting United States v. Garcia, 516 F.2d 318, 319 (9th Cir.), cert. denied, 423 U.S. 934 (1975)).

4. Under any standard of exigency, the police officers acted reasonably in this case. The majority's contrary conclusion is not only erroneous, but it also rests on an overly rigid and unworkable standard of exigency. Rehearing en banc should be granted to correct the majority's error and to bring the Court's decisions into conformity with the Supreme Court's recent decision in Wilson.

**CONCLUSION**

For the foregoing reasons, rehearing en banc should be granted, the panel's decision should be vacated, and the district court's decision should be reversed.

Respectfully submitted,

KRISTINE OLSON
United States Attorney
District of Oregon

STEPHEN F. PEIFER
Assistant U.S. Attorney
District of Oregon

JOSEPH DOUGLAS WILSON
Attorney
Department of Justice

AO 93 (Rev. 5/85) Search Warrant

48

# United States District Court

DISTRICT OF Oregon

Certified to be a true and correct copy of original.
Dated 11/7/94
Donald M. Sinnhong, Clerk
By J. Todd Deputy

In the Matter of the Search of
(Name, address or brief description of person or property to be searched)

A single Family Dweling located at:
23170 S.E. Bohna Park Road;
Boring, Oregon

## SEARCH WARRANT

CASE NUMBER: 94m 630

TO: Wayne K. Kauffmann and any Authorized Officer of the United States

Affidavit(s) having been made before me by Wayne Kauffmann (Affiant) who has reason to believe that ☐ on the person of or ☒ on the premises known as (name, description and/or location)

23170 S.E. Bonha Park Road; Boring, Oregon, a light tan single family dwelling located on approximately ten (10) acres, with a large blue shed, a smaller green shed, and atleast two (2) travel trailers.

in the District of Oregon there is now concealed a certain person or property, namely (describe the person or property)

the person of Alan Lawrence Shelby, a white male; date of birth, 03/23/66; 160 lbs.,; 5'09" tall; brown hair; and blue eyes

I am satisfied that the affidavit(s) and any recorded testimony establish probable cause to believe that the person or property so described is now concealed on the person or premises above-described and establish grounds for the issuance of this warrant.

YOU ARE HEREBY COMMANDED to search on or before November 13, 1994 (Date)

(not to exceed 10 days) the person or place named above for the person or property specified, serving this warrant and making the search [redacted] (at any time in the day or night as I find reasonable cause has been established) and if the person or property be found there to seize same, leaving a copy of this warrant and receipt for the person or property taken, and prepare a written inventory of the person or property seized and promptly return this warrant to ANY U.S. Magistrate Judge (U.S. Judge or Magistrate) as required by law.

Further because of exigent circumstances shown in the application, you are authorized to enter the premises without complying with the Knock-and-Announce requirement.

November 4, 1994 4:28 P.M. at Portland, Oregon
Date and Time Issued — City and State

Donald C. Ashmanskas, U.S. Magistrate Judge
Name and Title of Judicial Officer

Donald C. Ashmanskas
Signature of Judicial Officer

Citation
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Wednesday, April 3, 1996

Denver & The West

# Drug-raid shooting victim wins $225,000 settlement

Denver Post Staff and Wire Reports

GREELEY - A man shot seven times by a police officer during a massive drug raid in the hamlet of East Eaton in 1993 has settled out of court with the city of Greeley for $225,000.

Juan Pablo Rocha-Gallegos, a local ranch hand, wasn't charged in connection with the drug raid, which did net 16 other arrests, or after he was accused of pointing a .357 Magnum at the Greeley officer, who then shot him as he leaped from his bed.

Rocha-Gallegos has maintained that he did not touch the gun that was lying on a nearby dresser when police executed a no-knock search warrant on the trailer home where he lived and burst in upon him before dawn on Nov. 12, 1993.

The city of Greeley agreed to the settlement despite two federal investigations into the shooting that showed no wrongdoing by the police and comments by the Weld County district attorney that the officer, Otto Hubbard, "would have been derelict" had he not shot the man. The district attorney concluded that the officer was "justified under the circumstances."

City Attorney Rick Brady said yesterday that the settlement was "like an insurance policy for the county because (the plaintiff) originally asked $1.2 million."

The agreement states that there is no admission of liability by the police in the shooting incident, and Brady said the settlement is important because his office - "although we have a good case" - wasn't certain it could win before a federal jury.

The drug **raid** was billed as the largest ever in Weld County. East Eaton was stormed by 170 National Guardsmen, **police** officers and sheriff's deputies. Armed with **no-knock** search warrants and assault weapons and backed by 20 Humvee all-terrain vehicles and drug-sniffing dogs, officers raided five East Eaton properties, about 10 miles north of Greeley, and two in north Greeley.

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Law enforcement officials said the raid was the culmination of a lengthy investigation into drug-dealing activities among members of an extended family who had set up shop in the tiny community known as "Ragtown."

Although the Weld County Drug Task Force had obtained a no-knock search warrant for the trailer where Rocha-Gallegos lived, police had no warrant for his arrest.

They were seeking his brother, who was arrested that morning on drug charges.

Rocha-Gallegos has said he was awakened by the sound of the locks being shot off, then jumped out of bed when six people burst through the door shining flashlights on him.

Rocha-Gallegos spent 12 days in the hospital for bullet wounds in his chest, side, right arm and one leg.

The most significant sentences resulting from the investigation and the raid were for Francisco "Kiko" Gallegos, the alleged drug-gang ringleader, and Jesus Enrique Rocha-Gallegos, who were each sentenced to 14 years in prison, and a 12-year sentence and a $12,000 fine for Marcos Orlando Torres Monroy.

Gallegos, who owned an East Eaton bar, sold about 4 ounces of cocaine to an undercover agent, and Jesus Rocha-Gallegos was charged with selling cocaine and heroin to undercover agents on eight occasions.

Both pleaded guilty to several counts of selling drugs to undercover agents.

Monroy pleaded guilty to six counts of possession and distribution of controlled substances.

---- INDEX REFERENCES ----

KEY WORDS: LAWSUITS; SHOOTINGS; POLICE; DRUG RAIDS; AGREEMENTS; COLORADO

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**Boston** Herald
Copyright 1994

Sunday, March 27, 1994

NEWS

# **Boston** Police 'sorry' for fatal mistake

Maggie Mulvihill and Joseph Mallia

A 75-year-old **minister** who police say was "as innocent as a newborn baby" died because a police SWAT team hit the wrong apartment, Police Commissioner Paul Evans acknowledged yesterday.

Evans apologized to the family of the Rev. Accelynne Williams, his neighborhood and the city. But an attorney hired by the family said the family "wants more than an apology."

"The one tragic fact that is clear at this time is that the Rev. **Accelyne Williams** was an innocent victim in the continuing war on drugs," Evans said.

The SWAT team - armed with a no-knock warrant - rammed into the Williams' Dorchester apartment and handcuffed the elderly man who later died from a heart attack.

A confidential informant told police that a heavily armed Jamaican drug gang was operating out of an apartment at 118 Whitfield St.

The informant told the police the drug den was in an apartment on the second floor, but the apartment he meant was actually on the building's third floor.

When the unannounced team - armed with shotguns and semi-automatic sidearms and wearing masks and helmets - battered down Williams' apartment door, he fled in horror to a bedroom, sources said.

Officers then battered down that door as well, where they found "a very frightened" Williams up against a wall with his fists up, sources said.

"It took two officers to subdue him. For an elderly guy, he was quite strong. He struggled the whole time," said one police source.

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(Publication page references are not available for this document.)

"They 'cuffed him with flexicuffs, and put him on the floor face down. But then he began to vomit, so they rolled him over on his side so he could breathe and called (an ambulance)," the source said.

Police then entered the apartment and conducted a fruitless search for drugs and weapons.

His widow, Mary Williams, clad in black and shaking, declined comment yesterday.

"I can't say anything," Williams said, as she secluded herself in a bedroom at a friend's home yesterday. "I can't talk to anybody now.

Evans said he met with Mary Williams yesterday morning for about 45 minutes.

"I extended the department's deepest sympathies to her and her family, and expressed our apology and regret for this tragic mistake," Evans said.

"In our conversation this morning, his wife pointed out the irony that her husband has dedicated his life to fighting drugs," he said.

At a press conference yesterday, Evans said he would not duck his first major crisis as commissioner.

"Six weeks ago, when I was sworn in as police commissioner, I stated that when we made a mistake we would admit it and accept responsibility for it," the commissioner said.

"In that spirit, I am apologizing not only to the Williams family, but the residents of the Mattapan community, and to the entire city for this tragedy," he said.

But John F. Drewry, an attorney hired by the family, said legal action against the city is possible.

"The family is going to be looking for much more than an apology," Drewry said.

The unusual layout of the building led to the tragedy, Deputy Superintendant Pervis Ryans Jr. said. Deputy Superintendant Edwar Eagar said it appeared that the officers followed correct procedures in entering the apartment.

Detectives conducted surveillance of the building to corroborate the informer's statements, but did not conduct

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(Publication page references are not available for this document.)
surveillance of the individual apartment, Ryans said.

And the informant was not brought inside the building to verify the correct apartment because that would have endangered the operation, he said.

Meanwhile, police yesterday said Drug Unit Det. Lisa Lehane - who prepared the affidavit for the search warrant and who pointed to Williams' door as being the correct apartment door before police burst in - said the confidential informant had provided reliable information at least twice in the past.

The affidavit stated that police expected to find an arsenal of weapons in the second-floor apartment, among them Uzis, semi-automatics, Glocks and MAC-10's, as well as cocaine and marijuana, police sources said.

"It seemed so needless and senseless," said the Rev. Rirchfield Aymer, Williams' close friend. "If only someone had stopped to check."

"Initially, I couldn't understand," Aymer said of the bungled raid. "Then I became angry, and I'm still angry about it."

Herald staffers Jason Johnson and Helen Kennedy contributed to this report.

---- INDEX REFERENCES ----

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The Evansville Courier
Copyright 1994

Monday, December 19, 1994

METRO

# 'No-knock' raid triggers anger Couple claim they were innocent victims

ROBERTA HEIMAN, Courier staff writer

Evansville police used tactics they had never used before in a predawn raid on an alleged "crack house" on Washington Avenue last week.

The tactics were justified, said police Sgt. Michael Lauderdale, in order to assure officers' safety. But some residents of the neighborhood said it was the most frightening thing they've ever experienced.

Sabrina Rucker contends she and her family were innocent victims caught between the police and alleged criminals in a "terrifying" episode.

Mrs. Rucker and her husband, Marcus, and daughter, Akiesha, 15, were asleep in their apartment at 131 Washington Ave., downstairs from the alleged crack house, when the police burst into their home at 3:50 a.m. Tuesday.

She said officers pointed a gun at her head and forced her to stand naked while they searched the apartment.

"It was horrible," she said. "I woke up and didn't know what was happening. It sounded like a war zone with loud bombs going off and blue lights flashing everywhere.

"All I could think of was my daughter (asleep in another bedroom) and I ran to find her.

"I bumped into a policeman and he had a gun pointed at my head. My husband said lie down, they're going to kill you.

"It was a nightmare," she sobbed. "A nightmare."

Three occupants of the upstairs apartment were arrested and charged with dealing in cocaine. Two are from Michigan, and police say had come to Evansville to establish a "crack house" in the apartment in November.

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(Publication page references are not available for this document.)

Mr. and Mrs. Rucker were jailed on preliminary charges of trafficking in cocaine, with bonds set at $25,000. But at a Tuesday morning court appearance the charges against the Ruckers were reduced to charges of possession of less than 30 grams of marijuana, a misdemeanor.

They were released after posting $150 bond.

Mrs. Rucker denies there were drugs in their apartment.

"There was no marijuana in our home," said Mrs. Rucker, 39.

She said she and her husband have no prior record of drug crimes.

They have lived in the Washington Avenue apartment for a year and have been "excellent tenants," said landlord Tom Offutt.

Offutt said he leased the upstairs apartment on Oct. 19 to a woman who told him she was a college student, and her boyfriend.

"She gave me references and I checked them out," he said.

The apartment is now a shambles, though the city plans to reimburse the landlord for the damage.

Officers broke out doors and windows, tore out the heat vents, tore insulation out of the attic, tore the beds apart and knocked the legs off the chairs and sofas.

There are holes in the walls from the explosive devices used by officers.

Lauderdale said those devices are called "flash bangs. They're a diversionary device. They explode, there's a flash and a boom, very loud."

"It was like 'The Twilight Zone,' " said Mary Smith of 129 Washington. "It was like a war. The SWAT team came running out of U-Haul trailers with guns. Police were everywhere. Bombs went 'boom, boom!' "

She said about five police officers banged on her door, came into her apartment and told her and her family to get in a back room.

"I'll never forget this as long as I live," she said. "The whole neighborhood is upset."

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St. Petersburg Times
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Saturday, July 23, 1994

TAMPA BAY AND STATE

# 'We were just a family watching TV'

TIM ROCHE

Next to the window in his bedroom, Karnis Lewis settled into his favorite chair to watch a television movie.

In the living room, his stepson and grandchildren were ready to call it a night.

**Robert Lee Peters** sat on the floor, leaning against the couch where his 7-year-old autistic daughter was asleep. His 9-year-old son, BeBop, was lying on the floor.

They, too, were watching television, just as they did most nights since the children had come to spend the summer with their father.

"All of a sudden, all hell broke loose," said Lewis, 67. "There was banging on the door and I came out of my bedroom. I started asking what the hell was happening."

Peters had gone to the front door, holding out his arms to push his weight against it. Lewis asked him who was outside.

"I don't know," Peters replied. "Get your gun."

In the next few minutes, bullets would riddle the small house at 1011 Seventh St. N. The children would watch as their father was dying, and Lewis would have a mild heart attack.

As it turned out, it was Pinellas County sheriff's deputies at the door. A SWAT team had a warrant to search the house because Peters was suspected of selling marijuana.

Two weeks after the fatal July 7 shooting, however, State Attorney Bernie McCabe has cleared three tactical deputies who fired at Peters.

In a letter released Friday, McCabe said Peters "was committing the crime of attempted murder of a police officer" when he shot a .38-caliber pistol three times.

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(Publication page references are not available for this document.)

But Lewis said his stepson was not even armed when bullets began whizzing into the house. In fact, Lewis said, he was still unlocking a safe in his bedroom to fetch the .38 when shots rang out.

Here's his version of what happened:

Peters went to the bedroom, asking Lewis whether he'd gotten the gun yet. The banging had stopped by the time Lewis found the gun, so Peters walked back to the living room.

BeBop was shaking, and he followed his father into the living room. "Go back in there with your grandpa," Peters told the boy.

As the youngster crossed the living room, Lewis said, a bullet missed him by inches. "They fired right through the door and if BeBop hadn't moved, it would've hit him."

They heard rustling in the back yard.

Then Peters looked up. He saw a bullet hole in the mirrored tile above the couch where his daughter, Carmen, had been asleep. "It made him mad and he started shooting out the back door," Lewis said.

Suddenly, Peters grabbed his side. He'd been shot. He walked in front of the couch, then fell to his knees.

"Call 911," he said. "Damn, it hurts."

Lewis said he told the 911 dispatcher that somebody had been trying to break into the house and shot his son. In the confusion, he said, he forgot the address and had to ask Peters.

That's when he somehow disconnected the phone and he had to call 911 again. By then, the shooting had stopped.

BeBop tried opening the front door, but a piece of wood blocked it. So Lewis pushed open the door and walked outside. He heard somebody to his left say something about police.

'Yes, I need police," Lewis replied. "My son's been shot."

Lewis said he realized that the man was police. As Lewis walked farther into the yard, he noticed several other men. One of them told him to put his hands above his head, and Lewis shouted an obscenity at him.

Finally, he opened the door to his stepson's pickup and sat down. "I was taking my time because I had a hard time breathing," said Lewis, who has emphysema.

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(Publication page references are not available for this document.)

Inside the house, young Robert Peters Jr. was trying to get his father a drink of water. But the boy called BeBop couldn't get his father to grasp a plastic bottle.

Outside, somebody asked Lewis whether others were still in the house. Lewis told them about BeBop and Carmen. One man began yelling for BeBop, telling him to get his sister by the hand and leave the house.

Once the youngsters were outside, Peters crawled to the front door. "He was already shot and wounded and they drug him across the street."

That's where Peters remained as paramedics loaded his stepfather into an ambulance to take him to the VA Medical Center at Bay Pines.

Not until the next day did Lewis learn that his stepson had died. At first, Lewis would not talk to investigators. But he relented after several days, he said.

Whether he told them about Peters' fearing possible burglars and about the 911 calls could not be confirmed Friday because investigators did not release their case files.

But the state attorney's four-page letter said tactical deputies were serving search warrants the night of July 7.

First, deputies went to the apartment of Peters' brother, George, who also was suspected of dealing marijuana. After SWAT deputies barged into George Peters' apartment and detained him, they went to his brother's house about 10 blocks away.

About 9 p.m., SWAT deputies knocked on Robert Peters' door and announced "police" and "Sheriff's Office" and "search warrant," according to McCabe's letter.

All 14 members of the SWAT team and a paramedic heard the deputies announce their presence at the front door, the letter said. So did a neighbor who lived about 85 feet away.

But the television was "turned up very loud," and the windows were closed, and the air conditioner was "emitting considerable noise," the letter said. "It is possible that because of all this noise, Karnis Lewis and Robert Peters (Jr.) could not hear the deputies."

Because deputies could not get in the front door, they went to the back yard. Peters then fired two shots through the front door, the letter said. Deputy James Smith saw Peters in the window, gun in

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(Publication page references are not available for this document.)
hand, as the deputies took their place near the back door.

Smith fired through the window. "As SWAT members opened the rear doors to the residence," the letter said, "Peters fired in their direction."

Deputies Peter Eigo and Timothy Connolly shot back. Tests later showed Eigo had fired the fatal shot to Peters' right flank.

The three deputies have returned to work, but sheriff's spokeswoman Marianne Pasha said an internal affairs investigation should be completed next week.

Lewis insists that his stepson did not provoke a shootout. The family didn't hear police identify themselves until Lewis walked outside, he said.

"We weren't no terrorists. We weren't holding nobody hostage. We were just a family watching TV."

---- INDEX REFERENCES ----

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The **San Diego** Union-Tribune
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Sunday, December 13, 1992

LOCAL

# Excesses blamed in 'bad' **raids**

PHILIP J. LaVELLE
Staff Writer

Three federal investigations into a drug raid that left an innocent Poway executive critically wounded in August will skirt the broader root causes of the errant raid, several knowledgeable federal sources warn. These sources say excesses in the war on drugs, including competition between agencies that are supposed to work together, contributed heavily to the shooting of Donald L. Carlson. And they say similar faults can be seen in other "bad" raids throughout the state and across the nation. Defense lawyers say flaws in the drug war threaten the civil rights of average citizens everywhere.

"The greatest damage drugs have done to our country is in the erosion of our civil rights," said Albert J. Krieger, a nationally recognized Miami defense lawyer whose clients include John Gotti, the "Dapper Don" of New York's Gambino crime family..

"We don't talk about (drugs) in terms of law-enforcement or in terms of education," Krieger said. "We talk about it in terms of war. If the president of the United States calls it a war, what is the typical police officer going to think? That he's on a mission. . . . And fundamental civil liberty has paid an enormous price in the war on drugs." Carlson, 41, was almost killed when heavily armed federal agents stormed his house on Silver Ridge Road at midnight Aug. 25. After almost two months in a hospital, he now calls himself a "spokesman for what is wrong with the war on drugs."

The raid on his home was planned by U.S. Customs Service agents acting on an informant's tip that 5,300 pounds of South American cocaine was being stored in Poway, guarded by men armed with automatic weapons. Customs was assisted by U.S. Drug Enforcement Administration (DEA) agents. The Customs and DEA agents were assigned to Operation Alliance, an anti-drug unit based at the border.

No drugs were found, and Carlson -- a Fortune 500 company executive roused from a deep sleep -- was wounded three times in the shooting that broke out after agents smashed into his house.

Since then, at least three secret federal investigations have sought to identify who is to blame for the ill-founded raid. But none is likely to examine the bureaucratic underpinnings of the drug war.

"The system caused this," said one senior federal source.

This source and others, all speaking on condition their names not be published for fear it could damage their careers, say the root causes of the errant raid on Carlson's house include:

[] Strong competition between some Customs agents and their counterparts in the DEA, a phenomenon that has intensified in the last three years since Customs was designated the principal drug-fighting agency at the border. "The Carlson shooting is an example of how competition between law-enforcement works to the detriment of the public," said one federal agent.

Added a San Diego jurist: "There's no question that when you have turf wars between law-enforcement agencies, you're going to have potential for disaster."

[] Heavy pressure from Customs managers -- who stand to gain professionally by generating arrests and big caseloads -- on street agents to produce headline-grabbing cases.

[] A pervasive emphasis among federal drug-fighting agencies on generating statistics showing big drug seizures to demonstrate to policy-makers and budget officials in Washington, D.C., that their efforts in the war on drugs are on the right track, thereby guaranteeing continued funding. [] An overreliance on informants.

San Diego County has seen several cases in the past year in which police raided the homes of innocent people only to find that they had the wrong house. Most of these **raids** were based on bad tips from informants. In July, an informant's bum tip led **San Diego** police to storm a Logan Heights home. The residents say their daughters were subjected to genital searches while a gun was held to the head of their 6-year-old son. No drugs were found. Police later apologized.

A year ago, a Riverside County task force raided a house in Vista, forcing everyone inside, including a 67-year-old grandmother, to lie face down on the floor at gunpoint. Again, no drugs.

And in April, an elderly La Mesa couple was shocked to see city police smash through their locked wrought-iron gate and then burst through their front door with a battering ram. Police began to search the house, then realized the suspected drug house they were to **raid** was a block away. Like **San Diego** police, they apologized.

It's also happened elsewhere around the state.

On Oct. 2, members of a Los Angeles County-federal drug task force shot and killed 61-year-old reclusive millionaire Donald P. Scott at his Malibu-area ranch. They thought they'd find more than 40 marijuana plants on the property. They found none.

Farther north, in late November, police in Stanislaus County acting on an informant's bad tip broke into a home and held a retired couple on the floor at gunpoint for 45 minutes before realizing their mistake. Later, a sheriff's official admitted they were "180-degrees wrong." The Carlson shooting led to a federal grand jury probe into the circumstances of the raid, keying on statements the informant made to agents. Meanwhile, Customs and the DEA are conducting their own separate internal investigations into their agents' actions.

U.S. Attorney William Braniff said those investigations should conclude in a month.

Sources caution that competition between federal law enforcement agencies is nothing new. But the intensity of the rivalry between some Customs and DEA agents working along the border is, sources say.

It came about after January 1990, when President Bush proposed a $10.6 billion plan designating five regions -- including the Southwest border stretching from California to Texas -- as high-intensity drug-trafficking areas eligible for millions of additional federal dollars. This new initiative brought the major shift in national drug strategy, giving Customs the leading role in the drug war at the border, a responsibility that had previously been the exclusive domain of the DEA. This, in turn, sparked intensified rivalry between some Customs and DEA agents, sources said, and manifested itself in the planning stages of the Poway raids. "It's very competitive now," one law-enforcement source said. Sources have said the informant in the Poway case, identified only as Ron, had been kicked out of the Operation Alliance offices by his DEA handlers about two weeks before the Carlson shooting. He was informally dismissed because DEA agents doubted his truthfulness, sources said. Customs and DEA officials have denied these reports.

Sources said despite his reported fall from grace, Ron was recruited by Customs agents at Alliance and used as the centerpiece of a major cocaine investigation.

How could this happen?

"Real simple," said one veteran lawman. "(It was) we'll show you (the DEA). . . . We'll go out and make a 5,000-pound cocaine case and show you." Another source said this stems from an attitude, fostered by supervisors at Customs, that Customs agents are the intelligentsia of federal drug enforcement.

Consequently, this source explained, "when a DEA agent says, 'This guy's no good,' the first thing a Customs agent wants to do is prove DEA wrong." Jack C. Kelley Jr., agent in charge of the Customs office here, declined to respond to these criticisms, saying he couldn't do so because the federal investigations are not complete.

Senior federal officials privately say such allegations of flaws in the drug war are overly broad and are being fed to the media by a small minority of agents.

But several law-enforcement sources critical of the Poway raid speculated that pressure from Customs managers on agents to make arrests and produce big cases probably inspired the raid. The motive was to go for a high-profile seizure, but this occurred at the expense of some basic police work, such as corroborating the informant's claims. This pressure is generated by a desire by managers to keep statistics high, several knowledgeable sources said. Impressive seizures allow these managers of the drug wars to ask for, and receive, larger staffs -- and higher pay.

Police sources say errant **raids** are a fact of life in drug work. Said one **San Diego** police veteran: "Every narc, at one time or another, has hit a wrong door."

---- INDEX REFERENCES ----

KEY WORDS: ARRESTS; ATTEMPT; BORDERS; CRIME; DRUGS; IDENTIFICATION; KILLINGS; MEXICO; POLICE; PROBES; SAN DIEGO; USA;

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Monday, November 2, 1992

NEWS

# Fatal Shooting by Police Questioned In Drug Raid / Critics say they have too much power

Associated Press

The death of a multimillionaire recluse shot by law officers during a failed raid on his **Malibu-area** ranch has raised questions about police tactics in the war on drugs.

The killing of former Hollywood socialite **Donald Scott** marked the second time in recent weeks that drug agents in Southern California have shot a person in a raid that yielded no evidence of drugs.

In the Scott case, an attorney contends that police hoped to seize the ranch under federal forfeiture laws that allow property to be confiscated before a defendant is convicted.

A similar raid in which San Diego County businessman Donald Lee Carlson was gravely wounded prompted an investigation by the U.S. attorney into whether federal agents acted improperly.

## QUESTIONS ABOUT LATITUDE

These shootings and other questionable raids around the country have caused concern among legal scholars about the latitude given police in the war on drugs.

"I hear more and more reports of this sort of thing happening," said Paul Rothstein, a Georgetown University law professor and past chairman of the American Bar Association's criminal procedures committee.

"Particularly the seizure of property aspect has been a major problem. It raises huge amounts of revenue for the government, so there's an incentive to do it," he said.

Scott, heir to a European chemicals fortune, was killed October 2 as members of a drug task force led by Los Angeles County sheriff's deputies burst into his rambling home in the hills above **Malibu.**

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Roused by his wife's cries and partially blinded by a recent cataract operation, the 61-year-old Scott rushed into the living room holding a .38-caliber revolver above his head.

Deputies said that instead of dropping the weapon as ordered, Scott lowered it in the officers' direction. He was shot twice in the chest.

HE HAD REFUSED TO SELL

Attorney Nick Gutsue, a longtime friend and executor of Scott's estate, contends that lawmen were looking for a reason to seize the 200-acre ranch. Scott had refused to sell his property to the federal government as part of an expansion of the adjacent Santa Monica Mountains National Recreation Area.

"This was not about drug seizure -- this was about asset seizures. They went up there to seize property," he said.

Captain Larry Waldie, who heads the Sheriff's Department narcotics bureau, strongly denied the allegation.

"To me that's an incredible statement or innuendo to suggest something like that," he said.

A week before the shooting, an air surveillance expert flew over the ranch and reported seeing about 50 marijuana plants growing in pots, Waldie said.

Drug agents' suspicions also were aroused by an informant's tip that Scott's wife of three months, Frances Plante, 38, was seen in **Malibu** flashing $100-dollar bills.

"We do believe dope was growing there," said Waldie.

Agents arrived at the ranch about 8:30 a.m., knocked and identified themselves to Plante, who failed to open the door, Waldie said. After several minutes, officers forced the door and burst inside.

The officers' contention that the gun was pointed at them is supported by the angle of a bullet that passed through Scott's bicep before entering his chest, Waldie said.

Also, the primer on the bullet that was chambered to fire appeared to have been dented by a firing pin, suggesting that Scott pulled the trigger but the gun failed to fire, Waldie said.

The gun and bullet are being examined as part of an investigation

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to determine whether the officers should face criminal charges.

The idea of Scott growing marijuana is ludicrous to Gutsue, who said Scott was fanatically anti-drug and even drove along back trails looking for marijuana that might have been planted without his knowledge.

Scott's independent wealth and lifestyle alone could have easily attracted the attention of drug agents. His inheritance made a regular job unnecessary, and Plante said in interviews just after the shooting that she regularly drew money from Scott's Swiss bank account and spent lavishly.

IRS GARNISHMENT

Furthermore, Scott had not filed an income tax return since 1987, Gutsue said, and the Internal Revenue Service garnished $3,000 per month from one of his bank accounts. "It was just sheer laziness on his part," said the attorney.

In the Carlson case, DEA and U.S. Customs Service agents were acting on an informant's tip that there were large amounts of cocaine in Carlson's suburban San Diego home.

Both agencies have declined to discuss the raid, citing the U.S. attorney's investigation.

John Coughlin, Carlson's attorney, said, however, that agents made no attempt to check out the information before crashing through the door around midnight August 26.

Paul Hoffman, legal director of the American Civil Liberties Union of Southern California, said both cases demonstrate that police have been given too much latitude in fighting the drug trade.

"I think the general concern is that the war on drugs and crime has been waged like a war . . . there are a wide variety of abuses that have occurred," he said.

Rothstein agreed, noting the belief has been underscored by the U.S. Supreme Court's decision to review several cases involving property seizures from people who were never charged with a crime.

---- INDEX REFERENCES ----

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Thursday, November 14, 1991

LOCAL NEWS

# ANATOMY OF A SHOOTING 8-year-old dies after gun battle during drug raid Officer thinks he may have killed boy

Kathy **Scruggs** STAFF WRITER

A narcotics detective fired four times into an 8-year-old boy's bedroom window because he thought a gunman who had already shot one officer was about to leap through it, a police official said Wednesday night.

But the suspect went out another window, and one of the detective's bullets may have killed Xavier Antone Bennett Jr., lying in his bed a few feet from the window.

Xavier died from a 9mm bullet wound in the left side of his neck.

"The detective thought about it, and after putting it all together in his mind, he felt like it could have been him," said the official, who asked not to be named.

"He's hoping and praying he's not, because he's going to have to live with that. In a way, you can call him a victim as well.

"It's one of those tragic things that happens," the official added. "People don't know what it feels like to be scared to death when somebody's got a gun and firing at you."

Atlanta police are conducting an internal investigation to determine whether it was a police bullet or a shot fired by his stepfather, Bobby Bowman, that killed Xavier.

Mr. Bowman was charged with murder as well as drug violations and aggravated assault. "The unfortunate death of this child is the direct result of the felonious acts of Mr. Bowman," said Police Chief Eldrin Bell.

The gunfire erupted at 2:15 a.m. Wednesday when nine morning-watch officers, both uniformed patrolmen and narcotics detectives, served a search warrant on Apartment 1093 at 2332 Walton Lane in the East Lake Meadows Housing Project. They were looking for drugs after Mr. Bowman, 29, allegedly made three crack

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cocaine sales to them. It was not clear why they did not arrest Mr. Bowman during one of the purchases.

Police said they knocked and identified themselves before ramming through the door.

Kathy Smith Bowman said she and her husband were asleep in the rear of the four-room apartment and did not hear police knock.

"We thought we were fixing to be robbed," she said. Her husband "grabbed the shotgun because it was beside the bed. He started shooting."

She said she crouched on the floor and heard her husband say, "I've been hit," before he leaped out the bedroom window. When the shooting stopped, she said, she ran to Xavier's bedroom and found him on the bed in a pool of blood. He gasped, "Mommy," before he died, she said.

Chief Bell said Mr. Bowman opened fire with a shotgun blast that missed several officers before striking Sgt. Wayne Snyder in the lower abdomen and a finger. Officers said the undercover detective was wearing a bulletproof vest, but the shot caught the edge of the garment and penetrated his abdomen. He was in satisfactory condition Wednesday night at Crawford Long Hospital.

Mr. Bowman was injured attempting to escape from a rear window. He was shot in the forearm, hand, knee and foot. He was in guarded condition at Grady Memorial Hospital.

"They hit the place and the guy came out firing with a shotgun and 9- millimeter pistol," said a police official who asked not to be named. "Everybody's ducking for cover and everybody's returning fire. Somebody yelled the guy was jumping out the window. He did jump out the rear window. A detective and couple of police officers were at the front of the apartment, and when somebody yelled he was coming out the window, the detective started firing at the window."

The official said the detective was "visibly upset."

"He never did say he was the one who hit the child," the official said. "The shade was drawn on the window, and I think in the heat of the moment he assumed it was that window. He had already heard shots. He knew the guy had a gun."

Mrs. Bowman said her husband had a 9mm pistol, but she didn't think he fired it during the melee.

Another official said it will take a ballistics analysis to determine if the bullet came from a police weapon or Mr. Bowman's

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pistol.

The officers confiscated 32 hits of crack cocaine and $2,500 in cash, including marked money police had used in the drug purchases, Chief Bell said.

A neighbor, Noland White, criticized police for bursting into the apartment.

"There would have been a better way to arrest a man," he said. "If somebody crashed through my door in the middle of the night, I'm going to start shooting. They're coming in here to hurt me or take something."

Lt. C.B. Jackson of the Special Investigations Section refused to discuss the Bowman case in particular but said ramming a door is a fairly common tactic with drug search warrants.

The ram is used to "facilitate a rapid entry because the person inside will almost automatically destroy any drugs," Lieutenant Jackson said. "If you wait for him to open the door . . . chances are the contraband has been flushed."

The shooting is the third in less than a week involving Atlanta children. Shortly after midnight Saturday, 11-year-old Jeremiah Anderson, who had been watching a dice game in Summerhill, was gunned down by two teens in ski masks. The suspects remain at large.

On Sunday night, Michael Taylor, a 19-year-old Atlanta man, was shot to death after flirting with a carful of girls in northwest Atlanta. Four boys - ages 11 to 14 - have been charged in his slaying.

Staff writers Bill Montgomery and Susan Laccetti contributed to this article.

---- INDEX REFERENCES ----

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Wednesday, December 2, 1992

NEWS

# Apologies 'Don't Help' For Cops' Drug Raid Error

Associated Press

William Hauselmann wants more than an apology after armed, masked police acting on a phony tip raided his home in search of a clandestine drug lab.

"All that pushing and pulling, and all they can do is apologize," Hauselmann said. "I think that's just rotten. Their apologies don't help a bit."

The 64-year-old retired ranch foreman said Monday that he was considering legal action.

He said he suffered a bruised back and facial cuts when he was pinned to the floor Saturday by drug agents who burst into his home, breaking down a door, in a search for a methamphetamine lab.

He said that his blood pressure has "gone straight to hell" since the raid and that his wife, Marian, 61, has had nightmares. They said they were handcuffed and held at gunpoint for 45 minutes.

"Those people are a bunch of gangsters. They're animals," he said. "You're supposed to have faith in the police, but they just lost mine. I don't have any use for them."

"I remember seeing those little beady eyes coming out from behind the ski masks," he said. "It's one of those things you see on television, but I never thought it would happen to me."

Officers obtained a warrant to search the Hauselmanns' home based on a Thanksgiving Day tip from someone who claimed he was being pressured to join a drug ring, said Stanislaus County sheriff's Sergeant Bill Welch.

"Our information was 180 degrees wrong," Welch said.

"I sympathize with the family," said Sheriff Les Weidman.

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"Obviously we thought there were armed drug dealers in there."

Hauselmann wants to know why no one checked with neighbors who could have assured authorities that he and his wife were not dealing drugs.

He said he and his wife eventually will "try to slough it off" but said he doubts they will ever forget.

In October in Southern California, millionaire rancher **Donald Scott** was fatally shot during a mistaken drug raid on his **Malibu** home.

---- INDEX REFERENCES ----

KEY WORDS: POLICE CONDUCT; CA; MISTAKES; DRUGS; CRIME; POLICE; SEARCH & SEIZURE;

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Tuesday, July 31, 1990

METRO

# N.H. JUDGE BLASTS POLICE SEARCH, THROWS OUT EVIDENCE IN DRUG CASE

Associated Press

NEW HAMPSHIRE

MANCHESTER, N.H. - A Hillsborough County Superior Court judge criticized Hudson police for flagrantly violating the state's "knock and announce" rule during a drug raid and ordered the evidence that was seized thrown out.

"The actions of the Hudson police in this case, which is apparently representative of their general procedure in executing all search warrants for narcotics, underscores the importance of the enforcement of the knock and announce rule," Judge William Groff wrote.

"The potential for unnecessary violence and injury to police and citizens by virtue of the indiscriminate use of such tactics is staggering."

Groff ruled in a case stemming from an April 1989 raid. In another drug raid four months later, **Hudson** police shot and **killed** Bruce **Lavoie** in his home as his wife and children watched. His widow; Susan **Lavoie**, has filed a $25 million lawsuit against the town and Police Department.

The suit, in federal court in Concord, alleges that the circumstances did not warrant police raiding the home without knocking. In court papers, the town and police acknowledge that police did not knock before entering the apartment, but claim police did announce who they were once they were inside.

In the April 1989 raid, Groff ruled last week in favor of defense requests to suppress evidence. Groff said he reached his decision after viewing a videotape.

"It is doubtful that the court would have appreciated the extreme violence attendant to the execution of the warrant by mere verbal description," Groff wrote.

He said marijuana and other items seized during the April 1989 raid could not be used to prosecute Christopher Roystan, 21, of Hudson. Groff said execution of the search warrant violated Roystan's constitutional right against unreasonable search and seizure.

Groff also threw out Roystan's confession to police that the marijuana was his.

Roystan is charged with felony possession of marijuana with intent to sell.

The "knock and announce" rule requires police to knock on a suspect's door and identify themselves before entering unless doing so would jeopardize police officers' safety or allow suspects to destroy evidence.

The rule is intended to protect people's privacy and to prevent violence that could result from unannounced entry.

Roystan's lawyer, Cathy Green, also represents Lavoie. Green declined to comment yesterday because the civil suit is pending in the Lavoie case.

AG3568;07/30 CORCOR;07/31,19:56 NEWHAM31

---- INDEX REFERENCES ----

KEY WORDS: NEW HAMPSHIRE; COURT; RULING

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The Saturday Oklahoman
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Saturday, December 21, 1991

NEWS

**Federal** Agents Raid Wrong **Guthrie** Home Resident Tells of **Forced** Entry, Claims

Abuse

Ed Godfrey

A Guthrie man says he feels "raped and violated" after agents of the U.S. Drug Enforcement Administration raided his home by mistake Thursday night.

Jerry Jones says DEA agents used an ax to break down the front door of his home and that he was handcuffed, shoved against a wall and kicked by agents before they realized they were at the wrong house.

"I didn't know what the hell was going on," Jones said. "I have no recall of names and faces. I just remember guns and blackjacks."

Jones, his wife and two daughters live at 3301 S Pine. Federal agents Thursday night were trying to execute a search warrant at 3307 S Pine, said Don Webb, resident agent in charge of the DEA office in Oklahoma City.

Webb said Friday he was still trying to learn what happened.

"If we made an error in the reading of the number, we will be the first to admit it," Webb said.

Jones said he, his wife Denise, and their 8-year-old daughter were in a bedroom listening to Christmas music on the stereo when they heard yelling and banging on the door.

Before Jones reached the door, agents had knocked it down and "I had two pistols in my face," he said.

Jones said he was not shown any badges or a search warrant by the agents. The men were wearing DEA jackets, he said. Jones claimed that while he was handcuffed one agent kicked him hard in the tailbone to get him to lie face down on the floor.

One of the agents then asked his wife about the address, Jones said. When she told him it was 3301 S Pine, the agent told the others they were at the wrong house, he said.

"Everyone went outside and just left," Jones said. "There were no apologies."

Jones, an industrial electrician, said he suffered abrasions on his back from the incident.

Webb said Jones' allegations are being investigated. He said he understood that the door was "forcibly entered" but called the alleged abuse by agents on Jones "extremely uncharacteristic" of raid teams.

"I have strong reservations about whether he was abused," Webb said.

Once agents were satisfied they were at the wrong house, "they did apologize and explain what was going on," Webb said.

"If you go out there and look at the mailboxes and the (numeral) addresses on them, you can see where the error might have occurred," Webb said.

The raid resulted from three drug arrests the DEA made Thursday morning in Chickasha, Webb said. Two of the men arrested, Benny Mack Golden, 33, and Mitch Allen Derenia, 39, live at 3307 S Pine in Guthrie, he said.

Golden and Derenia were charged in Oklahoma City federal court Friday with possessing 278.3 grams of methamphetamine with intent to distribute.

Golden was carrying a loaded .45-caliber semiautomatic handgun when he was arrested, records show. Agents were looking for other possible suspects and drugs at 3307 S Pine, Webb said. They are unsure where that home is located, he said.

Jones has retained Oklahoma City attorney Mike Gassaway and said he wants his door repaired as soon as possible. Webb said the DEA would pay for the door, "if (Jones) will allow us to do it."

"If he wants to litigate it, we will have to litigate it," Webb said.

Jones says he is amazed that law enforcement didn't first determine whether or not they had the correct address before breaking into his home. Whether he files a lawsuit or not "depends on what my attorney says," he said.

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Los Angeles Times
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Sunday, December 13, 1992

PART-A; Metro Desk

Man Shot in Botched Drug Raid Files Claim
Associated Press

Citation | Rank(R) | Database | Mode
10/8/89 BOSTONG 1 | R 6 OF 16 | ALLNEWSPLUS | Page
10/8/89 Boston Globe 1
1989 WL 4831205
(Publication page references are not available for this document.)

The Boston Globe
Copyright 1989

Sunday, October 8, 1989

NEW HAMPSHIRE WEEK

# DEADLY FORCE POLICEMAN'S FATAL SHOT WILL HAUNT HIM FOREVER OFFICER IN LAVOIE CASE FACES PROBES, TRAUMA

Bob Hohler, Globe Staff

NEW HAMPSHIRE WEEKLY

HUDSON - After everything -- the fight, the fatal gunshot and the frenzy that followed -- it was the memory of finding **Bruce Lavoie's** 8-year-old son in the dark that shook Hudson Police Sgt. Stephen J. Burke to tears.

Burke had burst into the boy's bedroom in a predawn drug raid, a police shield in one hand, a semiautomatic pistol in the other. The boy's father, sleeping in the room to comfort his son after a nightmare, had leaped up and tried to subdue Burke. The two had wrestled, Burke's gun had fired and Lavoie, a 34-year-old machinist who, authorities say, had less than two marijuana cigarettes in the apartment, had fallen to the floor.

"Are you hit?" Burke asked, according to a 350-page report on the fatal shooting by the New Hampshire attorney general's office.

Lavoie, moaning and asking for his wife, Susan, in the next room, indicated that he had been hit in the chest. At that, Burke called for an ambulance. And as Lavoie writhed on the floor, Burke sat on a mattress next to him, urging Lavoie to lay still.

Only then did Burke see Lavoie's son sitting on the bed. The boy had seen the struggle. He had heard the shouts and the gunshot. Now, as day began to break, he was watching his father die.

When Burke tried to recount the scene later for investigators, he faltered.

"At this time, Sgt. Burke became very emotional and began to cry," State Police Sgt. Michael Miles wrote in a report to Assistant Attorney General Andrew Serall. "He expressed concern for both his family and the family of the victim for what they would have to go through because of this incident."

Burke, a respected officer who often served as the

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(Publication page references are not available for this document.)

department's prosecutor in court, had cried earlier when he was driven from Lavoie's apartment to the Hudson police station. And like the at least 40 other officers involved in deadly force cases since 1974, he is likely to continue to suffer. His torment will include nightmares, name callers and recurring questions about his role in the shooting, said both a police psychologist and a New Hampshire police officer involved in an unrelated shooting.

"It's a tough thing to get over," said Lt. John E. Clark, a law enforcement specialist for the New Hampshire Police Standards and Training Council. Clark was a Concord police sergeant in 1985 when he fatally wounded Louis Cartier, a 16-year-old dropout from Concord High School who had taken two hostages at the school, then fired on Clark and another officer with a double-barreled shotgun.

"I feel for Sgt. Burke," Clark said. "I hope he weathers the storm."

Burke, who is 31 years old and married with no children, was placed on administrative leave soon after Lavoie died, leaving a wife and three young sons. Later, when the attorney general's report faulted Burke for "a serious breach of police protocol and training" in the raid, he was suspended for 10 days without pay.

Now, two months after the shooting, Burke apparently is unable to return to work. He has asked Hudson Police Chief Albert Brackett to keep him on indefinite sick leave and has applied for permanent disability status, a source said.

Burke could not be reached for comment last week, and Brackett would say only that Burke remains on sick leave, citing confidentiality laws regarding personnel records.

But no one expects Burke's recovery to come easily. After the shooting, he endured a probe in which the attorney general considered -- and rejected -- charging him with negligent homicide. The FBI investigated him. And the shooting prompted calls by the attorney general, state legislators, defense lawyers and the state chapter of the American Civil Liberties Union for improved police training and drug investigations.

In addition, Susan Lavoie filed a $25 million federal lawsuit against Burke and three other Hudson police officers. Hundreds of townspeople protested the shooting, among them a woman at a public hearing who called Burke "a bumbling idiot" and a man who wore a sandwich board that read, "Don't shoot, I have a family, too."

The Hudson police also received threats on Burke's life.

The sad irony, said Leo Shea, a police psychologist, is that

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(Publication page references are not available for this document.)
police officers involved in deadly force cases often are their own harshest judges. Shea, who consults for about 60 New Hampshire police departments, Hudson among them, would speak only in general terms about the issue, citing confidentiality laws. He said he has counseled more than 40 police officers involved in deadly force cases since 1974.

"I have not known one police officer who is not keenly aware of the commandment, 'Thou shalt not kill,' " Shea said. "Police officers generally are conservative. They believe it's their duty to preserve the peace, and it has an enormous impact on them when they take a life. They never forget it. In many cases, they end up the victim."

For Clark, whose decision to use deadly force was deemed justifiable by the attorney general, the aftermath may have been less troubling than Burke's has been.

Clark, a 12-year veteran, was platoon leader on Dec. 3, 1985, when Cartier, a shotgun in hand and ammunition belt around his waist, took two hostages in a high school stairwell. One hostage bargained for his freedom by offering Cartier a getaway ride. The other stood next to Cartier as armed police took positions around them.

The standoff itensified for 15 minutes. Then a teacher, Donald LeBrun, asked to trade places with the hostage. Cartier responded by aiming his shotgun at LeBrun. The teacher dove to the floor, and a Concord patrolman, Michael Russell, fired one round from his service revolver, striking Cartier in the ammunition belt.

"Why did you hit me?" Cartier said, shooting back and missing.

Then, as the hostage fled, Clark fired two rounds from his 12-gauge shotgun, hitting Cartier in the wrist and the head. The head wound was fatal.

Four years later, Clark remembers the months before the shooting as the best of his career. He had gained local celebrity as the Concord police department's public relations specialist and as head of security for Christa McAuliffe, the Concord social studies teacher who was selected to ride in space and later died on the Challenger shuttle explosion.

Clark had told McAuliffe's students how proud he was that he had never fired his weapon in the line of duty.

Then came the shooting. Afterward, people called him "baby killer," he said. He suffered nightmares, waking at night to the imaginary sound of gunfire. He replayed the episode countless times

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(Publication page references are not available for this document.)
in his mind. And he said he confronted "the vulnerability of a community and its citizens, whether they be you, me or Louis Cartier."

But Clark said he would do nothing differently if the same situation arose today.

"As cold as this may sound, I was called upon to do my job," he said. "I feel very badly for Louis Cartier. I feel sad for him. But, unfortunately, we had to take one life to save many others. To this day, I have no remorse about that."

Both Shea and Clark said much of the public fails to understand the complexity of a police officer's job.

"You hear people asking, 'Why didn't the officer just shoot the gun out of the suspect's hand?' " Shea said. "Well, this isn't television. It's real life."

Another segment of the public expects too much of police officers, Shea said.

"Most police officers don't want to be heroes," he said. "They also don't want to be scapegoats. And they certainly don't want to be martyrs."

Clark urged officers involved in deadly force cases to learn from the episodes and go forward. But that may be difficult for Burke, who is likely to face years of litigation, lingering memories and reminders of the effects of Lavoie's death on his family.

"Very obviously, **Bruce Lavoie's** wife and children are terribly traumatized," said Cathy Green, the family's lawyer. "This is something they are going to carry with them forever."

Burke has had no contact with the Lavoies since the shooting, Green said. But if history holds true, Burke, too, will carry the scars of **Bruce Lavoie's** death for a lifetime.

HOHLER;10/03 NKELLY;10/06,09:57 NHCOPS08

---- INDEX REFERENCES ----

KEY WORDS: NEW HAMPSHIRE; POLICE; SHOOTING; DEATH; ACCIDENT; NAME-BURKE; NAME-CLARK

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Citation | Rank(R) | Database | Mode
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1992 WL 8738942
(Publication page references are not available for this document.)
The Harrisburg Patriot
Copyright 1992

Friday, March 13, 1992

STATE/LOCAL

# Lawsuit seeks $100,000 in damages

Bill Savitsky Jr.
For The Patriot-News

WEST HAZLETON The survivors of a man killed by a state agent during a drug raid last month have filed a federal lawsuit calling the shooting death unjustified, and seeking more than $100,000 in damages from law-enforcement officials involved in the raid.

The lawsuit alleges that members of the state Attorney General's Southern Luzerne County Drug Task Force entered the home of 34-year-old **John Fellin** on Feb. 28 without a valid search warrant, and without knocking or identifying themselves as police, and shot Fellin without provocation.

Copies of the search warrants used by police show they expired 18 hours before the search.

Family members have said there was no struggle or any resistance offered by Fellin, and they have called the shooting "cold-blooded murder."

Police said Fellin, of 205 Winters Ave., was trying to wrestle a shotgun away from state narcotics agent James Kolojejchick when the suspected marijuana dealer was shot five times in the chest and pelvis by state drug agent Keith Charles.

A subsequent search found about one pound of marijuana in Fellin's home, and about four more pounds of marijuana in a former barroom at 21-23 Cranberry Ave., owned by Fellin's father, Leo, police said.

The Attorney General's office has completed its investigation into the shooting, but is waiting to announce its findings until Luzerne County District Attorney Peter Olszewski's separate investigation is complete, said Robert Gentzel, spokesman for the Attorney General's office.

Olszewski has said preliminary findings in his investigation show the shooting was "100 percent justified."

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(Publication page references are not available for this document.)
"The fact is . . . it was a justifiable shooting in self defense, after he attacked the police," Gentzel said.

The lawsuit was filed Wednesday in U.S. Court for the Middle District of Pennsylvania in Scranton by Fellin's estranged wife, Karen, and his father.

The suit asks for more than $50,000 in compensatory damages, more than $50,000 in punitive damages, plus costs and expenses.

Defendants named in the suit include Charles, Kolojejchick and fellow state drug agent William Gowden; Hazleton police Detective Edward Harry; West Hazleton Lt. Thomas Wallace and Officer William Harris; Freeland Officer David Bogansky; and Butler Twp. Police Chief David Remenar.

State Attorney General Ernie Preate Jr. also is listed as a defendant, although an attorney for Fellin's family said his inclusion is part of an "umbrella pleading" taken in case the lawsuit eventually is expanded to include Preate's office.

Attorney Michael Lynn of Bloomsburg called the initial filing a starting point for what likely will be numerous legal actions stemming from Fellin's death.

"This is a way to initiate action, to get in federal court and use the court's powers . . . to pursue this and other potential actions," Lynn said.

A related motion to have the court immediately seize all evidence related to the raid was denied by Judge Edwin Kosik.

---- INDEX REFERENCES ----

KEY WORDS: COURT

STORY ORIGIN: WEST HAZLETON

EDITION: FIRST

Word Count: 469
3/13/92 HARPEN B3
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No. 96-1469

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1996

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UNITED STATES OF AMERICA,

Petitioner,

v.

HERNAN RAMIREZ,

Respondent.

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DOCUMENTS A-G

LODGED IN SUPPORT OF RESPONDENT'S BRIEF

IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF SERVICE AND MAILING

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I, Michael R. Levine, counsel of record and a member of the Bar of this Court, certify that pursuant to Rule 29.2, service has been made of the within DOCUMENTS A-G LODGED IN SUPPORT OF RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI on the counsel for the petitioner by depositing in the United States Post Office, in

Portland, Oregon on May 16, 1997, first class postage prepaid, a certified true, exact and full copy thereof addressed to:

Walter Dellinger
Acting Solicitor General
Department of Justice, #5614
10th & Constitution, N.W.
Washington, D.C. 20530

Further, the original and ten copies were mailed to the Honorable William K. Suter, Clerk of the United States Supreme Court, by depositing them in a United States Post Office Box, addressed to 1 First Street, N.E., Washington, D.C., 20543, for filing on May 16, 1997, with first-class postage prepaid.

DATED this 16th day of May, 1997.

Michael R. Levine
Attorney for Respondent

JUN 12 PAGE 1.

(5)

Supreme Court, U.S.
FILED
MAY 28 1997
CLERK

No. 96-1469

# In the Supreme Court of the United States

OCTOBER TERM, 1996

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UNITED STATES OF AMERICA, PETITIONER

*v.*

HERNAN RAMIREZ

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## REPLY BRIEF FOR THE UNITED STATES

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WALTER DELLINGER
*Acting Solicitor General*
*Department of Justice*
*Washington, D.C. 20530-0001*
*(202) 514-2217*

8 pp

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# In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1469

UNITED STATES OF AMERICA, PETITIONER

*v.*

HERNAN RAMIREZ

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## REPLY BRIEF FOR THE UNITED STATES

1. Respondent contends that the government waived its right to challenge the Ninth Circuit's two-tiered approach in this Court because it did not directly challenge that rule until seeking rehearing and suggesting rehearing en banc. This Court's traditional rule, however, "precludes a grant of certiorari only when the question presented was not pressed or passed upon below." *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (internal quotation marks omitted). "That * * * rule operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon." *Ibid.*; see also *United States* v. *Wells*, 117 S. Ct. 921, 925-926 (1997); *Virginia Bankshares, Inc.* v.

*Sandberg*, 501 U.S. 1083, 1099 n.8 (1991); *Stevens* v. *Department of Treasury*, 500 U.S. 1, 8 (1991). The court of appeals clearly "passed upon" the issue that is presented in the petition; it explicitly applied a two-tier approach to unannounced entries that requires more specific inferences of exigency when the entry involves physical destruction of property. Pet. App. 8a.

The government's acquiescence in the two-tier rule until the rehearing stage does not provide a basis for denying review as a matter of discretion. The two-tier rule represented established Ninth Circuit precedent, under an en banc decision of many years' standing. *United States* v. *McConney*, 728 F.2d 1195 (9th Cir.) (en banc), cert. denied, 469 U.S. 824 (1984).[1] The district court had no authority to depart from that rule, and the government could not have prevailed on its initial appeal by challenging it before the panel. The government did, however, challenge that rule at the rehearing stage, giving the en banc Ninth Circuit the opportunity to reconsider its rule. There is therefore no merit to respondent's

[1] In *McConney*, the en banc court of appeals upheld an unannounced entry based on its conclusion that a "mild exigency" was sufficient to justify an entry that did not involve property destruction. 728 F.2d at 1206. Because it prevailed in *McConney*, the government had no opportunity to seek review of the court's two-tier standard. And, when McConney filed a petition for a writ of certiorari challenging the "mild exigency" holding, the government urged that certiorari be denied because, "under any standard, exigent circumstances fully justified the officers' actions here." Memorandum for the United States in Opposition at 3, *McConney* v. *United States*, No. 83-1884 (O.T. 1984). Moreover, as respondent notes (Br. in Opp. 14-15 & n.3), in the intervening years, the government generally prevailed even under the two-tier standard.



contention that the petition should be denied because of an alleged waiver. Cf. *United States* v. *Williams*, 504 U.S. at 44-45.

2. Respondent argues (Br. in Opp. 9) that there is no circuit conflict over the Ninth Circuit's two-tiered approach because "[t]he government fails to cite a single case that has ever even questioned the Ninth Circuit's approach, much less rejected it." Although circuit conflicts may be noted explicitly by the lower courts, such overt recognition is not a necessary precondition for a conflict, since one exists "when two courts have articulated plainly inconsistent statements of law and have used them to reach different results on the same issue." Arthur D. Hellman, *By Precedent Unbound: The Nature and Extent of Unresolved Intercircuit Conflicts*, 56 U. Pitt. L. Rev. 693, 712 (1995). As we demonstrate in our petition for a writ of certiorari (Pet. 18-21), no other court of appeals focuses on damage to property as the key determinant requiring greater specificity of proof to justify an unannounced entry by law enforcement officers.[2] Thus, contrary to respondent's claim, the

[2] Respondent relies on *United States* v. *Stewart*, 867 F.2d 581, 584 (10th Cir. 1989); *United States* v. *Brown*, 52 F.3d 415, 421 (2d Cir. 1995), cert. denied, 116 S. Ct. 754 (1996); and *Dorman* v. *United States*, 435 F.2d 385, 393 (D.C. Cir. 1970). As we note in our petition (Pet. 20 & n.9), however, a subsequent decision by the Tenth Circuit has held that *Stewart* imposed no requirement that a "specific showing" is needed. See *United States* v. *Maden*, 64 F.3d 1505, 1509 n.2 (1995). Similarly, respondent does not take issue with our explanation (Pet. 20 & n.10) that the Second Circuit's decision in *Brown* does not entail a two-tier inquiry—either in its articulation of the governing multi-factor test or in its application of that standard. And *Dorman* cannot be construed to require a specific (and

consideration of property damage by the other courts of appeals is "plainly inconsistent" with the Ninth Circuit's requirement of a greater showing on the government to justify such an entry when property has been destroyed.

3. Respondent further contends (Br. in Opp. 15-26) that the outcome below was correct for alternative reasons. Those contentions are either irrelevant or without merit. The court below assumed the existence of probable cause in rendering its decision on the knock-and-announce issue, see Pet. App. 12a n.1, and the district court properly rejected respondent's submission that probable cause for the warrant was lacking, see *id.* at 28a. The court of appeals' decision not to reach the probable cause issue does not preclude this Court's review of the appropriate principles to apply when law enforcement officers make a "no-knock" entry. Similarly, respondent's challenge to the magistrate judge's jurisdiction to issue an appropriate warrant is misplaced. Not only did respondent not raise this issue below, but the legal principle presented in the petition should be decided irrespective of what judicial officer has the appropriate authority to issue the search warrant. Finally, respondent suggests (Br. in Opp. 21) that "Section 3109 contains no exception for danger to the officers executing the warrant." That contention, however, misunderstands the balancing of interests inherent in Section 3109's codification of Fourth Amendment and common-law principles. See Pet. 10-11 & n.3 (discussing *Wilson* v. *Arkansas*, 115 S. Ct. 1914, 1918 n.3 (1995); *Sabbath* v. *United States*, 391 U.S. 585, 591 n.8 (1968)).

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higher) showing if the entry will involve even de minimis destruction of property. See 435 F.2d at 393.



4. In seeking to defend the correctness of the court of appeals' judgment, respondent relies (Br. in Opp. 26-34) on a totality-of-the-circumstances inquiry. That approach, however, is not the theory of the court of appeals. Critical to the Ninth Circuit's unique rule is the principle that property damage significantly elevates the threshold showing needed to justify an entry without compliance with the knock-and-announce requirement; the "mild exigency" sufficient to justify no-knock entries without property damage is not enough. The issue that warrants review by this Court is whether the two-tier standard *should* govern the analysis. We submit that it should not.

The Ninth Circuit's rule erroneously makes the need to damage property dictate the showing of whether it is "reasonable" for officers to enter without a prior announcement. As this Court explained in *Richards* v. *Wisconsin*, No. 96-5955 (Apr. 28, 1997), slip op. 8:

> In order to justify a "no-knock" entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence.

If the police lack such a reasonable suspicion, an unannounced entry is not permitted. But if the police have such a reasonable suspicion, officers are permitted to effect a sudden entry—and thus protect their own and others' safety or preserve the objects of the search—whether or not some breakage of property is required.

Although respondent expresses the view that it is generally safer to knock and announce, the judgment of law enforcement officers is that avoidance of danger is often best achieved when officers quickly take control of the situation in a no-knock entry. The Ninth Circuit's rule thus inhibits law enforcement practices that reduce risks in the execution of warrants. See Pet. 21. The holding below magnifies the problems in the Ninth Circuit's rule, because the destruction of property was de minimis—a broken garage door windowpane—and the fugitive sought by the officers had already harmed other innocent persons. The court's decision thus improperly minimizes the legitimate and reasonable interests of law enforcement officers by imposing a two-tier showing every time the execution of a search warrant in a "no-knock" circumstance results in damage to property. Because there is no reason that officers operating in the jurisdiction of the Ninth Circuit alone should have to face enhanced risks, this Court's review is warranted.

* * * * *

For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

WALTER DELLINGER
*Acting Solicitor General*

MAY 1997

Supreme Court, U.S.
FILED
SEP 2 1997
CLERK

No. 96-1469

# In the Supreme Court of the United States

OCTOBER TERM, 1996

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UNITED STATES OF AMERICA, PETITIONER

*v.*

HERNAN RAMIREZ

---

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE NINTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES

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## QUESTION PRESENTED

Whether police officers must possess more specific evidence of danger to themselves or others in order to justify a no-knock entry in which they damage a door or window than would be required to justify a no-knock entry made without damage to property.

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 91 F.3d 1297. The opinion of the district court (Pet. App. 28a-38a) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on August 2, 1996. A petition for rehearing was denied on November 15, 1996 (Pet. App. 48a). On February 4, 1997, Justice O'Connor extended the time for filing a petition for a writ of certiorari until March 15, 1997 (a Saturday). The petition was filed on March 17, 1997, and was granted June 23, 1997 (117 S. Ct. 2478). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 3109 of Title 18 of the United States Code provides:

> **Breaking doors or windows for entry or exit**
>
> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

## STATEMENT

A grand jury in the District of Oregon returned an indictment charging respondent with possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g)(1). Respondent moved to suppress evidence obtained during a search of his residence, including the two firearms that formed the basis for the offense charged in the indictment. The district court granted the motion. Pet. App. 28a-38a. The court of appeals affirmed. *Id.* at 1a-27a.



1. On November 2, 1994, while en route to testify at a state criminal trial, federal inmate Alan Lawrence Shelby slipped out of his handcuffs, assaulted a deputy sheriff, and escaped from custody. At the time, Shelby was serving concurrent sentences for federal drug and firearms violations, and for a state armed robbery conviction. Pet. App. 2a, 32a-33a. On November 4, 1994, Deputy U.S. Marshal Wayne Kauffmann applied for a warrant to search respondent's residence in Boring, Oregon, for Shelby. *Id.* at 41a. The affidavit in support of the warrant application recounted that a reliable confidential informant had seen a person believed to be Shelby at respondent's residence. The person had been introduced to the informant as "Alan," and had stated in the informant's presence, "I had to knock out a guard." *Id.* at 39a. According to the affidavit, after the agent received that information, the informant and an agent with the Bureau of Alcohol, Tobacco, and Firearms had driven past respondent's residence and seen a man "who they believed to be * * * Shelby, outside the residence." *Id.* at 39a-40a. Deputy Marshal Kauffmann's affidavit further stated that he had then driven to respondent's residence and seen someone who, Kauffmann believed, was the same person seen by the ATF agent. *Id.* at 40a.

The affidavit also described the basis for Deputy Marshal Kauffmann's belief that "Shelby is an extreme danger to law enforcement officers." Pet. App. 41a. In particular, it stated that Shelby had previously been convicted of conspiracy to manufacture methamphetamine, possession of methamphetamine with intent to distribute it, and using or carrying a firearm during and in relation to a drug trafficking offense; that Shelby "had a history of violent

escapes"; and that Shelby had stated that he would not "do federal time." *Id.* at 38a.

According to the affidavit, in 1991 Shelby had attempted to escape from custody "by striking a corrections officer in the face and kicking out the door of the jail. Shelby ran from the jail and assaulted a woman in a parking lot and stole her vehicle. During the escape attempt, Shelby rammed a police vehicle with the stolen vehicle." Pet. App. 38a. The affidavit further stated that Shelby "has made threats to kill witnesses and police officers associated with his incarceration" and that he "has brutally tortured others in the past with a hammer." *Id.* at 38a-39a. Finally, the affidavit stated that Shelby "has had access to large caches of weapons." *Id.* at 39a. See also *id.* at 33a.

Based on the information in the affidavit, a magistrate judge issued a warrant to search respondent's residence for Shelby. The warrant expressly provided that, "because of exigent circumstances shown in the application, you are authorized to enter the premises without complying with the Knock-and-Announce requirement." C.A. E.R. 27.

Before they executed the warrant, officers learned from the informant that respondent "was possibly involved in drugs, which he kept in the garage," and that "there were supposed to be several guns in [respondent's] garage." Pet. App. 3a, 33a, 43a-44a. On November 5, 1994, at about 6:15 a.m., approximately 45 law enforcement officers surrounded respondent's house. Using a loudspeaker, a police officer announced the officers' presence and ordered the occupants of the dwelling to come out. At the same time, a police officer broke open the window of the garage attached to the house, while another officer shouted



"Sheriff's Office, Search Warrant." *Id.* at 3a-4a, 29a, 44a.

Awakened by the police activity, respondent initially thought that his house was being burglarized. He ran to a closet, obtained a gun, and fired it into the ceiling. A short time later, respondent realized that the police had surrounded the house, and he surrendered. After receiving and waiving his *Miranda* rights, respondent admitted that he was a convicted felon and that he owned the gun that he had fired, as well as another firearm. Respondent further admitted that a man resembling Shelby had been at his house two days earlier. Based on respondent's statement, and the officers' observation of the gun respondent had fired, the officers obtained a second search warrant and seized the two firearms. Pet. App. 4a, 29a, 45a-46a.

2. Respondent was charged with possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g)(1). He moved to suppress the firearms seized from his house, and the district court granted the motion. Pet. App. 28a-36a. The court found that the warrant to search respondent's house for Shelby was supported by probable cause. *Id.* at 30a-31a. It concluded, however, that the officers had violated the federal knock-and-announce statute, 18 U.S.C. 3109, and the Fourth Amendment because their reasons for making an unannounced entry were insufficient to justify breaking the window of respondent's garage as they announced their presence. Pet. App. 31a-35a.

The court stated that, under Ninth Circuit precedent, "mild exigency, such as knowledge that a person is dangerous, can justify an immediate entry that is done without physical destruction of property," but an "entry that is accomplished by physical destruction of

property [requires] more specific inferences of exigency." Pet. App. 32a (citing *United States* v. *Becker*, 23 F.3d 1537, 1540 (9th Cir. 1994)). The court acknowledged that "there were specific facts known regarding Shelby's propensity to attempt escape, his disdain for federal incarceration, and his past willingness to use threats and violence as a means of intimidation." *Id.* at 34a. Those facts, the court concluded, presented "sufficient exigent circumstances to have allowed immediate entry into [respondent's] residence where entry could be obtained without physical destruction of property." *Id.* at 33a.

The court held, however, that the government had not demonstrated sufficient exigency to justify breaking respondent's window during the search because "there was no information that [Shelby] was armed and dangerous at [respondent's] home, or that he would present any specific dangers to arresting officers if found there." Pet. App. 34a. In the court's view, the officers' decision to break a garage window in the course of serving the warrant, "although prompted by a knowledge of Shelby's past, was not sufficiently supported by circumstances suggesting that the fugitive posed a particular danger to others during this attempted apprehension." *Id.* at 34a-35a. Because it concluded that the bases for the second search warrant, and the subsequent seizure of respondent's firearms, were "direct consequences of the manner in which the first warrant was executed," the court ordered that the weapons be suppressed. *Id.* at 35a.

3. A divided panel of the court of appeals affirmed. Pet. App. 1a-27a. The majority stated that "exigent circumstances can justify breaking into a house without notice," but "[w]hen exigency is claimed, we



must determine what kind of exigency it was." *Id.* at 8a.

Like the district court, the majority employed the two-tier analysis required by circuit precedent. It explained that, while "even a mild exigency, like knowledge that a person is dangerous, can justify immediate entry where that can be done without any physical disruption of property," Pet. App. 8a (quoting *Becker*, 23 F.3d at 1540), "[m]ore specific inferences of exigency are necessary" where the destruction of property is involved, *ibid.* (quoting *Becker*, 23 F.3d at 1541).

Applying that test, the majority held that a sufficient level of exigency had not been shown here:

> The 45 officers did not fear any of the actual residents of the house and were not attacking a gang or cult hangout where they might be met by a fusillade of gunfire. They were concerned about one person, Shelby, who might be on the premises. But Shelby was not known to have ever shot or shot at anyone. He was an escape artist, who said he would not go to federal prison. He had knocked people down in his escape attempts, and he had stolen a car and run into a police vehicle. His violence towards law enforcement had not extended beyond that, even though he had obviously been arrested on some occasions. Perhaps his degree of dangerousness bespoke a mild exigency. Certainly it did not bespeak more.

Pet. App. 9a. Because it found that the government had failed to adduce "specific evidence that Shelby was armed, that he would use firearms against the officers, or that when he was faced with [a] show of force he would do anything violent at all," *id.* at 11a-

12a, the court concluded that respondent's "statutory and Fourth Amendment rights were violated when government agents broke into his [house] in the early morning hours without complying with the knock-and-announce requirements," *id.* at 17a.[1]

Judge Kozinski dissented. Pet. App. 18a-27a. He argued that "the record contradicts the majority's romantic description of Shelby," who was, in Judge Kozinski's view, "a hardened and desperate criminal." *Id.* at 18a. Judge Kozinski emphasized that the officers knew that Shelby had "a history of violent escapes," had "[a]ssault[ed] helpless citizens" and law enforcement officers in effecting those escapes, and had engaged in "brutal[] tortur[e]." *Id.* at 19a-20a. The dissent further observed that officers had specific information about Shelby's access to firearms. *Id.* at 20a. Based on those facts, the dissent argued that the officers had "properly balanced the homeowner's privacy and property interests against the dictates of security." *Id.* at 23a-24a (citing *Wilson* v. *Arkansas*, 514 U.S. 927, 934 (1995)).[2]

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[1] The majority further concluded that the "seizure of the guns * * * came as the most direct, if not the only, result of the" police "break-in," and that "suppression would serve to dissuade the police from this kind of unnecessary invasion of people's homes." Pet. App. 13a.

[2] Judge Kozinski also dissented on the ground that, "[e]ven had the no-knock search been illegal, this would provide no grounds for suppression of the evidence pertaining to [respondent]." Pet. App. 24a.



## SUMMARY OF ARGUMENT

This Court's decisions make clear that the question whether officers may make an unannounced, no-knock entry turns on whether the officers reasonably believe that giving prior notice of their presence and purpose, and providing a grace period for occupants to open the door, would expose the officers to a risk of danger, would facilitate a fugitive's escape, or would likely prompt the destruction of evidence. *Richards* v. *Wisconsin*, 117 S. Ct. 1416, 1421 (1997); *Wilson* v. *Arkansas*, 514 U.S. 927, 934 (1995). In overcoming the general requirement of knock and announcement, therefore, the government must show that the "countervailing law enforcement interests" of the officers executing the warrant outweigh the privacy interests of the occupants of the dwelling to be searched. *Wilson*, 514 U.S. at 934.

The Ninth Circuit has concluded that, when officers break property to effect a no-knock entry, that action significantly elevates the showing of potential harm to officers required to justify the entry. While a "mild exigency" justifies unannounced entries in which property is not damaged, even minor damage to property requires officers to have "[m]ore specific inferences of exigency." Pet. App. 8a. The Ninth Circuit's two-tier approach to no-knock entries is incorrect, because it erroneously makes property damage the determinant of how specifically officers must be able to infer a risk of danger before they may make a no-knock entry. The constitutionality of the decision to enter unannounced should not be influenced by the officers' need to damage property in effecting entry. Because officers cannot foresee the precise means of gaining control in dangerous and risky circum-

stances, they "are often forced to make split-second judgments * * * about the amount of force that is necessary in a particular situation." *Graham* v. *Connor*, 490 U.S. 386, 397 (1989).

The court of appeals' approach also conflicts with the deference this Court has afforded to officers to exercise discretion when faced with unknown dangers. Officers frequently employ tactics that involve minimal damage to property to enhance the element of surprise and tactical control of the situation. The Ninth Circuit's rule unjustifiably calls into question such tactics when officers do not have heightened evidence of exigency.

That is not to say that destruction of property has no place in analyzing the reasonableness of the entry. Excessive or wholly unnecessary destruction of property by law enforcement officers in the execution of a warrant may violate the Fourth Amendment's reasonableness standard. But whether such property damage occurred is not a relevant consideration in assessing whether the officers were justified in deciding to effect a no-knock entry in the first place.

Under a proper analysis, the decision to enter unannounced in this case was constitutional. The officers not only had a warrent for an escaped convict, but they had a reasonable suspicion that he would violently resist apprehension. That convict had a history of violent encounters with officers and ready access to weapons. The fugitive was also known to be determined to avoid capture and to have a past conviction for use of weapons in drug-related offenses. The officers' decision to effect a sudden entry to neutralize the risks of violence posed was reasonable.

Respondent suggests that the reasonableness of the no-knock entry should be judged with reference to



the totality of the circumstances. This Court has held that the totality of the circumstances bears on whether a particular law enforcement practice constitutes a "search" or "seizure." In this case, the issue is not whether a search occurred, however, but rather whether the unannounced entry to execute the warrant was reasonable. The Court has also looked to the totality of the circumstances in addressing whether probable cause or reasonable suspicion existed in a particular case. In that setting, the reasonableness of the police officers' action is measured not by events that occur after officers have chosen to make an intrusion. Rather, it turns on an objective analysis of information available to the officers at the time they decide to make the intrusion in question. The same principle applies here; property damage that occurs after officers decide to effect an unannounced entry is not relevant to whether the decision itself was justified.

Even if this Court were to apply a totality-of-the-circumstances analysis that considered property damage as one factor, that standard is satisfied here. The only additional intrusion into respondent's privacy interests by the officers' unannounced entry was the damage to the garage door windowpane. That interference with property interests was *de minimis* and outweighed by the reasonable justifications given by the officers for making an unannounced entry.

## ARGUMENT

### THE OFFICERS' DECISION TO MAKE A NO-KNOCK ENTRY WAS REASONABLE, NOTWITHSTANDING THAT THEY DAMAGED PROPERTY IN EFFECTING THE ENTRY

"[T]he reasonableness of a search of a dwelling may depend in part on whether law enforcement officers announced their presence and authority prior to entering." *Wilson* v. *Arkansas*, 514 U.S. 927, 931 (1995). "The Fourth Amendment's flexible requirement of reasonableness," however, "should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests." *Id.* at 934. When officers have a reasonble suspicion that a prior announcement would create a threat of violence, invite the destruction of evidence, or risk the escape of a suspect, an unannounced entry is constitutionally reasonable. *Richards* v. *Wisconsin*, 117 S. Ct. 1416, 1421 (1997); *Wilson*, 514 U.S. at 936. The issue is whether law enforcement needs justify a sudden entry. Contrary to the Ninth Circuit's rule, the fact that property is damaged in the course of the entry does not elevate the burden on officers to justify their decision to make an unannounced entry in the first place.

#### A. An Unannounced Entry Is Reasonable When Legitimate Law Enforcement Interests Justify Dispensing With Announcement

In *Wilson* v. *Arkansas*, this Court concluded that the common law requirement that officers announce their identity and purpose before entering a home forms part of the Fourth Amendment inquiry into the reasonableness of the officers' entry. 514 U.S. at 931. The knock-and-announce principle furthers three



interests. First, it protects "the individual privacy interests intruded upon by a no-knock entry." *Richards*, 117 S. Ct. at 1421. Although the search or arrest warrant itself justifies a significant intrusion on the occupants' privacy interests, an announcement before entry tempers the suddenness of the invasion of privacy. See *id.* at 1421 n.5. Second, a prior announcement protects officers from the possibility that occupants will take violent defensive action based on the mistaken assumption that a criminal intruder is at the door. *Sabbath* v. *United States*, 391 U.S. 585, 589 (1968). Third, a knock before entry prevents needless damage to the door of the home by giving occupants an opportunity to admit the officers peacefully. *Miller* v. *United States*, 357 U.S. 301, 307, 313 (1958); 2 Wayne R. LaFave, *Search and Seizure* § 4.8(a), at 599 (3d ed. 1996).[3]

*Wilson* made clear that the knock-and-announce principle is not an absolute requirement, but may be overcome by "countervailing law enforcement interests." 514 U.S. at 934. Without delineating "a comprehensive catalog" of the factors that could overcome the "presumption in favor of announcement," the Court noted that an unannounced entry may be justified in such circumstances as when officers face "a threat of physical violence," *id.* at 936, "where police officers have reason to believe that evidence would likely be destroyed if advance notice were given," *ibid.*, and "where a prisoner escapes * * * and retreats to his dwelling," *ibid.* (citing *Reed* v.

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[3] In the event that the police have come to the wrong address, a prior announcement and period of delay before entry would also permit occupants to advise the police of that fact.

*Case*, 4 Conn. 166, 170 (1822) (plaintiff who "had resolved * * * to resist even to the shedding of blood * * * was not within the reason and spirit of the rule requiring notice")). The Court left it to the lower courts in the first instance to elucidate when "law enforcement interests may * * * establish the reasonableness of an unannounced entry." 514 U.S. at 936.

In *Richards* v. *Wisconsin*, the Court provided additional guidance on the circumstances that justify an unannounced entry. The Court rejected a blanket exception to the knock-and-announce requirement when officers execute search warrants in felony drug investigations. 117 S. Ct. at 1418. The Court acknowledged, however, that unannounced entries may be justified when law enforcement needs override the privacy concerns protected by the knock-and-announce principle.

> In order to justify a "no-knock" entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence. This standard—as opposed to a probable cause requirement—strikes the appropriate balance between the legitimate law enforcement concerns at issue in the execution of search warrants and the individual privacy interests affected by no-knock entries.

*Id.* at 1421-1422.[4]

[4] Before *Richards*, the federal courts of appeals generally characterized the circumstances that may justify dispensing with a prior announcement as "exigent circumstances." See, *e.g.*, *United States* v. *Stowe*, 100 F.3d 494, 499 (7th Cir. 1996), cert. denied, 117 S. Ct. 1438 (1997); *United States* v. *Maden*, 64 F.3d 1505, 1509 n.2 (10th Cir. 1995); *United States* v. *Brown*, 52 F.3d 415, 421 (2d Cir. 1995), cert. denied, 116 S. Ct. 754 (1996); *United States* v. *Kennedy*, 32 F.3d 876, 882 (4th Cir. 1994), cert. denied, 513 U.S. 1128 (1995); *United States* v. *Lalor*, 996 F.2d 1578, 1584 (4th Cir.), cert. denied, 510 U.S. 983 (1993). *Richards* establishes, however, that the proper analysis is whether the officers have "reasonable suspicion" that a knock and announcement would be futile, or would lead to danger or a loss of evidence. 117 S. Ct. at 1421; see *id.* at 1422 (adding that "[t]his showing is not high"). *Richards* itself, which upheld the no-knock entry involved in that case, did not refer to "exigent circumstances." *Ibid.* The phrase "exigent circumstances" can lead to some confusion in evaluating the reasonableness of unannounced entries, see Pet. 18 n.8, and, under *Richards*, it is no longer appropriate to require "exigent circumstances" in this context.



### B. The Fact That Property Is Damaged In Effecting An Unannounced Entry Does Not Require Officers To Have More Specific Knowledge Of Danger To Officers

The court of appeals adopted an incorrect approach to evaluating the reasonableness of unannounced entries. While permitting the police to justify unannounced entries with "even a mild exigency" if they did not break property in entering, the court of appeals held that a higher showing is required if the unannounced entry entails even minor "physical disruption of property." Pet. App. 8a (quoting *United States* v. *Becker*, 23 F.3d 1537, 1540 (9th Cir. 1994)). See also *United States* v. *McConney*, 728 F.2d 1195, 1206 (9th Cir.) (en banc), cert. denied, 469 U.S. 824 (1984). Under that two-tier approach, where property is damaged during a no-knock entry to execute a warrant, officers must demonstrate "[m]ore specific inferences of exigency" (Pet. App. 8a) than would other-

wise be required. The court of appeals' focus on property damage in determining the level of justification needed to support a no-knock entry is erroneous.

1. As the Court recognized in *Wilson*, the validity of an unannounced, no-knock entry depends on the law enforcement interests that exist when officers enter the premises in question. 514 U.S. at 934-937. *Richards* holds that the test is whether police have "reasonable suspicion" that a prior announcement would threaten those law enforcement interests. 117 S. Ct. at 1421. That judgment, the Court explained in *Richards*, "must be evaluated as of the time [the officers] entered." *Id.* at 1422. Neither *Wilson* nor *Richards* suggests that the reasonableness of the decision to make an unannounced entry may turn on whether property is damaged at some point in the entry.[5]

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[5] In *Wilson*, the State argued that the unannounced entry was valid because the officers feared that a prior announcement would expose them to peril or would have produced a risk of destruction of evidence. 514 U.S. at 937. The Court remanded, noting that "[t]hese considerations may well provide the necessary justification for the unannounced entry in this case." *Ibid.* Although the entry had been effected by the officers' "opening an unlocked screen door" without any apparent damage to property, *id.* at 929, the Court did not suggest that that fact would play a role in the reasonableness analysis to be conducted on remand. In *Richards*, this Court itself found that the unannounced entry was supported by reasonable suspicion, and therefore affirmed "the reasonableness of the officers' decision" to make "a no-knock entry." 117 S. Ct. at 1422. Although the officers entered by "kicking and ramming the door to gain entry to the locked room," *id.* at 1419, the Court did not indicate that the existence of property damage elevated the showing required to justify the officers' decision to make an unannounced entry.



Under a proper analysis, the need to damage property in making an unannounced entry has no bearing on the presence of the law enforcement interests that justify that entry. When the requisite peril to officers exists, or other risks make it reasonable for officers to employ the element of surprise, the decision to enter without a prior knock and announcement is valid. The fortuity of an unlocked door or open window should not determine whether the officers may execute an unannounced entry. Officers may not know whether it will be hard or easy to enter a house until they are literally on the doorstep. Thus, they "are often forced to make split-second judgments * * * about the amount of force that is necessary in a particular situation." *Graham* v. *Connor*, 490 U.S. 386, 397 (1989). Cf. *Dalia* v. *United States*, 441 U.S. 238, 257 n.19 (1979) ("[O]ften it is impossible to anticipate when [it] will be necessary" for officers to engage in "forceful breaking [in order] to effect a warranted search."). The justification for the immediate entry is the need for surprise; that need does not diminish simply because it may be necessary to damage property to enter the premises.

The question whether an unannounced entry is justified, therefore, should turn on whether law enforcement interests would be jeopardized by giving advance warning, not on whether property is damaged during the entry. And where "knowledge that a person is dangerous" (Pet. App. 8a) would justify unannounced entry through an open door or window, no greater or more specific showing should be required merely because a locked door or window makes a

degree of property damage necessary to safe execution of the warrant.[6]

2. The Ninth Circuit's rule is inconsistent with general Fourth Amendment principles, which make clear that the "'principal' object of the [Fourth] Amendment is the protection of privacy rather than property." *Soldal* v. *Cook County*, 506 U.S. 56, 64 (1992); *Warden* v. *Hayden*, 387 U.S. 294, 304 (1967). In requiring reasonable suspicion before officers may

[6] We have found no authority in state statutory law requiring a showing of greater justification on the part of officers to make a no-knock entry to execute a warrant when to do so involves damage to property. See, *e.g.*, Me. R. Crim. P. 41(i) (West 1997); Okla. Stat. Ann. tit. 22, § 1228 (West 1996). Case law in only two States, Alabama and Nebraska, considers property damage as a factor in evaluating the degree of exigency required. See *State* v. *Moore*, 535 N.W.2d 417, 422-423 (Neb. Ct. App. 1995) (agreeing with Ninth Circuit approach and requiring officers to make showing of greater risk of danger when physical destruction of property is necessary); *State* v. *Ogden*, 640 A.2d 6, 9-10 (Vt. 1993) (holding that exigency may justify non-forceful entry and leaving open level of justification required if forceful entry is made).

The predominant rule among the States is that officers may dispense with knock and announcement when to give notice will increase the risk of peril to the officers or the likelihood that evidence will be destroyed. No additional requirement is imposed when destruction of property will occur in making the unannounced entry. See, *e.g.*, *People* v. *Ackerman*, 654 N.Y.S.2d 876, 877 (App. Div. 1997), appeal denied, 89 N.Y.2d 1087 (May 5, 1997); *People* v. *Krueger*, 675 N.E.2d 604, 608, 610 (Ill. 1996), petition for cert. pending, No. 96-1786 (filed May 9, 1997); *State* v. *Stevens*, 511 N.W.2d 591, 595-596 (Wis. 1994), cert. denied, 515 U.S. 1102 (1995); *Commonwealth* v. *Rodriguez*, 614 N.E.2d 649, 651-652 (Mass. 1993); *State* v. *Matos*, 605 A.2d 223, 224-225 (N.H. 1992); *State* v. *Piller*, 628 P.2d 976, 978-979 (Ariz. Ct. App. 1981); *Commonwealth* v. *Cundriff*, 415 N.E.2d 172, 178 (Mass. 1980), cert. denied, 451 U.S. 973 (1981).



take protective actions in other search-and-seizure contexts, this Court has never required a greater justification on the officers' part if their action—intentionally or unintentionally—results in damage to property. For example, a pat-down search does not require probable cause (as opposed to reasonable suspicion) simply because the officer tears a pocket on the suspect's jacket. Cf. *Terry* v. *Ohio*, 392 U.S. 1 (1968). Nor is the decision to make a protective sweep of a house invalid if an officer should break an object while conducting the search. Cf. *Maryland* v. *Buie*, 494 U.S. 325 (1990). Similarly, a search warrant will not be invalidated even if the manner of its execution is called into doubt. See *Maryland* v. *Garrison*, 480 U.S. 79, 84 (1987). By the same reasoning, the need to damage or destroy property in making an unannounced entry should not impose on officers the burden to justify their decision by more than reasonable suspicion that peril to themselves or destruction of evidence may occur if they knock and announce their presence.

That conclusion draws additional support from this Court's holding that breaking of property in effecting an unannounced entry is not necessary to trigger the federal knock-and-announce statute, 18 U.S.C. 3109. *Sabbath* v. *United States*, 391 U.S. 585 (1968).[7] Al-

[7] Although *Sabbath* involved Section 3109, both that provision and the Fourth Amendment incorporate the common law announcement principle—and the acknowledged grounds for dispensing with a prior announcement. See *Wilson*, 514 U.S. at 934 n.3 (noting that in *Sabbath*, 391 U.S. at 591 n.8, the Court suggested that both the "'common law' rule of announcement and entry and its 'exceptions' were codified in § 3109"). Accordingly, precedents interpreting Section 3109 are relevant to analysis of the constitutional issue, and, by the same token,

though Section 3109 uses the phrase "break open," the Court explained that "[a]n unannounced intrusion into a dwelling—what § 3109 basically proscribes—is no less an unannounced intrusion whether officers break down a door, force open a chain lock on a partially open door, open a locked door by use of a passkey, or * * * open a closed but unlocked door." *Id.* at 590; see also *ibid.* ("The protection afforded by, and the values inherent in, § 3109 must be governed by something more than the fortuitous circumstance of an unlocked door.") (internal quotation marks omitted). *Sabbath* teaches that the central value protected by the knock-and-announce rule is "the reverence of the law for the individual's right of privacy in his house." *Id.* at 589 (quoting *Miller*, 357 U.S. at 313). Consistent with a recognition that that value is not absolute, the Court in *Sabbath* examined the no-knock entry in that case to determine whether "lack of compliance with the statute is excused because an announcement might have endangered the informant * * * or the officers themselves." *Id.* at 591. The Court rejected that submission because of a lack of "substantial basis for excusing" the failure to announce. *Ibid.* The Court did not suggest that, because no property was damaged, a "mild exigency" would have sufficed to justify the unannounced entry.

3. The court of appeals' approach is also disruptive to law enforcement and increases the risk of harm faced by officers executing warrants. Under the Ninth Circuit's two-tier inquiry, the breaking of *any* property automatically increases the burden on the

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Section 3109 does not impose a more stringent burden on federal law enforcement officers than is imposed by the Fourth Amendment.



officers to possess "more specific inferences" of danger or other harms that warrant an unannounced entry. The court of appeals has suggested that such inferences would include proof that "evidence was being destroyed," *United States* v. *Whitney*, 633 F.2d 902, 910 (9th Cir. 1980), cert. denied, 450 U.S. 1004 (1981), or "specific information [that a dwelling's resident] was armed and dangerous," *Becker*, 23 F.3d at 1541. Because such specific inferences are ordinarily unavailable to officers before they decide to enter a dwelling unannounced, the court of appeals' rule would require officers to forgo unannounced entries to execute search warrants, even where the available facts strongly support the use of surprise to reduce risks to officers.[8]

Executing search warrants is often highly dangerous. To minimize those dangers, officers sometimes break a window to distract the occupants and thereby increase the officers' ability to gain quick control of the situation. By drawing the occupants' attention to the sound of breaking glass, officers may be able to divert the occupants into less threatening positions, gain control of their movements, and reduce the risk of violence. Cf. *Michigan* v. *Summers*, 452 U.S. 692, 702-703 (1981) ("The risk of harm to both the police

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[8] The burdens placed on law enforcement officers by the "specific inferences" test are well demonstrated by this case. Here, although the escaped-fugitive Shelby had previously struck a corrections officer in the face to effect an escape, had stolen a car and rammed it into a law enforcement vehicle, had threatened to kill witnesses, had tortured another person with a hammer, had vowed not to serve federal time, and had access to weapons, the court of appeals surmised that "[p]erhaps" Shelby's "degree of dangerousness bespoke a mild exigency. Certainly it did not bespeak more." Pet. App. 9a.

and the occupants is minimized if the officers routinely exercise unquestioned command of the situation."). On other occasions, officers may use distraction devices that emit a bright flash of light and a loud noise in order to divert the inhabitants' attention away from the officers' point of entry. Such devices—which are designed precisely to reduce the threat of violence to officers, inhabitants, and the public—often require minor property damage such as the breaking of a window. See, *e.g.*, *United States* v. *Dahlman*, 13 F.3d 1391, 1394 & n.3 (10th Cir. 1993), cert. denied, 511 U.S. 1045 (1994). Officers should not be required to forgo the employment of such tactics simply because they cannot meet the stringent showing imposed by the court of appeals. As Judge Newman once observed:

> Armchair experts may differ as to whether a police officer apprehending a suspect believed to be armed and dangerous incurs less risk by breaking in unannounced or by securing the area and giving notice from a safe distance. Experience has shown that either course can precipitate injury and death. The Fourth Amendment is not the arbiter of this choice of tactics.

*United States* v. *Cognato*, 408 F. Supp. 1000, 1005 (D. Conn.), aff'd, 539 F.2d 703 (2d Cir. 1976), cert. denied, 430 U.S. 956 (1977).

This Court has afforded deference to the contemporaneous assessment by police officers of the violent risks they face. The Court has frequently noted the "weighty interest in officer safety," *Maryland* v. *Wilson*, 117 S. Ct. 882, 885 (1997), and, in recognition of that interest, has never required absolute assurance that a particular situation would threaten officers' safety to justify a measured intrusion on Fourth Amendment interests. See, *e.g.*, *Buie*, 494 U.S. at 336 ("protective sweep" of house justifiable based on "reasonable suspicion of danger"); *Michigan* v. *Long*, 463 U.S. 1032, 1049 (1983) ("protection of police and others can justify protective searches when police have a reasonable belief that the suspect poses a danger"); *Michigan* v. *Summers*, 452 U.S. at 702-703 ("interest in minimizing the risk of harm to the officers" justifies detaining occupant of premises while search is conducted); *Pennsylvania* v. *Mimms*, 434 U.S. 106, 110 (1977) (per curiam) (relying on "inordinate risk confronting an officer" to justify requirement that driver exit car in a traffic stop); *Chimel* v. *California*, 395 U.S. 752, 763 (1969) (search incident to arrest justified on ground that, without search, "officer's safety might well be endangered"). The "specific inferences" required by the court of appeals would expose officers to heightened risks in the particularly dangerous setting of warrant execution. That rule conflicts with the consistent view of this Court that, "[c]ertainly, it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties." *Terry*, 392 U.S. at 23.



4. Although the Ninth Circuit's consideration of property damage in no-knock entries is incorrect, the fact that property is destroyed does have a place in analyzing the reasonableness of the entry. Damage to the premises entered, even significant damage, should not elevate the burden on law enforcement officers to show the reasonable suspicion that justifies their decision to enter unannounced. But excessive or wholly unnecessary destruction of property by law enforcement officers in the execution of a war-

rant may violate the Fourth Amendment's reasonableness standard.[9]

Officers must have considerable leeway in determining the degree of force needed to effectuate an entry. Compare *Graham* v. *Connor*, 490 U.S. at 396-397. But there is a "longstanding requirement[] that the officers * * * avoid *unnecessary* damage to the premises." 2 LaFave, *supra*, § 4.10(d), at 673-674 (emphasis added); *United States* v. *Kemp*, 12 F.3d 1140, 1142 (D.C. Cir. 1994) (interests advanced by statutory knock-and-announce requirement include "preventing *needless* destruction of private property") (emphasis added); *Buckley* v. *Beaulieu*, 104 Me. 56, 61 (1908) (where officers unnecessarily destroyed walls of suspect's home, "the manner and extent of the search in this case were unreasonable and in excess of the officers' authority"). Thus, even when an unannounced entry is justified to protect the officers' safety or to foil an escape, the no-knock entry must still be carried out in a reasonable manner, involving a proportionate amount of force.

Courts should not lightly second-guess how much force is reasonable. But just as officers may not use excessive force in making an otherwise valid probable-cause arrest, see *Graham* v. *Connor*, 490

[9] That consideration of property damage reflects the fact that one of the interests underlying the knock-and-announce principle is the avoidance of needless damage to property. See *Wilson* v. *Arkansas*, 514 U.S. at 931; *Richards*, 117 S. Ct. at 1421 n.5. That interest implicates the *manner* in which the unannounced entry is made, rather than *whether* the decision to enter unannounced is reasonable. As this Court has noted, "the reasonableness of a [law enforcement action being challenged] depends not only on *when* it is made, but also on *how* it is carried out." *Graham* v. *Connor*, 490 U.S. at 395.



U.S. at 397, they may not destroy property unnecessarily in making an otherwise-valid unannounced entry. At the same time, the use of excessive force in making an arrest does not invalidate the probable cause that supported the initial decision to arrest. Similarly, in the context of an unannounced entry, the excessive breakage of property in making an entry does not invalidate the reasonable suspicion that supported the initial decision to dispense with a prior knock and announcement.

### C. The No-knock Entry In This Case Was Valid Based On The Reasonable Suspicion That The Fugitive Sought By The Warrant Might Pose A Threat Of Violence

As we have shown, a proper analysis of the entry in this case considers, first, whether the officers had reasonable suspicion to justify dispensing with an announcement before entry, and, second, whether any breakage of property during the entry was excessive under the circumstances. Applying that test, the entry in this case complied with the Fourth Amendment and Section 3109. The warrant to search respondent's property was based on probable cause to believe that Shelby was hiding there. Pet. App. 30a-31a.[10] In addition, the officers executing the warrant had reliable information that (1) Shelby had been convicted of a number of felonies, including using or carrying a firearm during and in relation to a drug trafficking offense; (2) Shelby "had a history of violent escapes," and had stated that he would not "do federal time"; (3) Shelby had attacked officers

[10] The court of appeals expressed some doubt about that proposition, but it decided this case on the assumption that probable cause was established. Pet. App. 12a n.1.

and innocent bystanders in past escape attempts; (4) Shelby "ha[d] made threats to kill witnesses and police officers associated with his incarceration"; (5) Shelby "has had access to large caches of weapons"; (6) respondent Ramirez "was possibly involved in drugs, which he kept in the garage"; and (7) "there were supposed to be several guns in [respondent's] garage." *Id.* at 32a-33a, 38a-39a, 43a-44a. Based on that knowledge, the officers had ample reason to conclude that a risk of violence would arise if they announced their presence before entry, and that making an unannounced entry would significantly reduce that risk. The officers were therefore justified in making a no-knock entry, whether or not the manner of entry required some damage to property.[11]

Not only was the unannounced entry justified, but the damage to respondent's property was neither gratuitous nor excessive. Rather, the minimal step of breaking the window to respondent's garage simultaneously with announcement and entry was a reasonable way both to obtain entry and to draw the occupants to a position away from the doors, thus facilitating the officers' ability to control the search scene. Accordingly, the manner of entry in this case was lawful.

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[11] The fact that the officers did not find Shelby does not undercut the reasonableness of their actions at the time. "It goes without saying that in determining the lawfulness of entry * * * we may concern ourselves only with what the officers had reason to believe *at the time of their entry.*" *Ker* v. *California*, 374 U.S. 23, 40 n.12 (1963) (plurality opinion); cf. *Illinois* v. *Rodriguez*, 497 U.S. 177, 186 (1990).



### D. The Officers' No-knock Entry Was Reasonable Even Under A Totality-Of-The-Circumstances Analysis

Respondent has suggested that the officers' conduct in effectuating a no-knock entry was unreasonable in view of the totality of the circumstances. See Br. in Opp. 30. A totality-of-the-circumstances test that includes property damage as one factor should not be employed here, for many of the reasons why the Ninth Circuit's two-tier approach should be rejected. But even if such a totality-of-the-circumstances test were applicable, the entry in this case should be held reasonable.

1. This Court has often looked to the totality of the circumstances in evaluating police conduct. The totality of the circumstances bears on whether a particular police action constituted a "search" or "seizure" within the meaning of the Fourth Amendment. See, *e.g.*, *Ohio* v. *Robinette*, 117 S. Ct. 417, 421 (1996) (whether driver of automobile is "free to leave" or is "seized"); *Florida* v. *Bostick*, 501 U.S. 429, 439 (1991) (whether police questioning aboard a bus constitutes a "seizure"); *Michigan* v. *Chestnut*, 486 U.S. 567 (1988) (whether investigative pursuit of suspect is a "seizure"); *Florida* v. *Royer*, 460 U.S. 491, 506 (1983) (whether detention in airport constitutes a "seizure"). In such a case, the degree and character of the intrusion on individual interests is relevant. Here, however, there is no question that a no-knock entry is a "search and seizure" that is subject to the Fourth Amendment.

The Court has also applied a totality-of-the-circumstances analysis in evaluating whether the police had probable cause, *Illinois* v. *Gates*, 462 U.S.

213, 238 (1983), or reasonable suspicion, *United States* v. *Cortez*, 449 U.S. 411, 418 (1981). But that analysis focuses on "the events which occurred leading up to the stop or search, and then [on] the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause." *Ornelas* v. *United States*, 116 S. Ct. 1657, 1661-1662 (1996). The Court has not held that the degree of intrusiveness with which the stop is carried out is one of the circumstances taken into consideration in determining the appropriateness of the decision to make the stop or search. Given *Richards*' holding that the reasonable-suspicion standard applies to the evaluation of no-knock entries, an examination of facts that the officers did not know (and perhaps could not anticipate) at the time they decided to enter, such as what property might be damaged, would be equally inappropriate here.

2. Although a totality-of-the-circumstances approach that takes into account the degree of breakage of property would be inappropriate in analyzing the reasonableness of officers' decision to dispense with the knock-and-announce requirement, that test is easily met in this case. The officers had significant justifications for entering without a prior announcement, in view of the officers' need to secure premises reasonably believed to be harboring an escaped convict who had already injured four people. See Pet. App. 19a-20a. Respondent's interests in avoiding a violent confrontation based on a mistaken impression that the entering officers are criminal intruders and in reducing embarrassment or fright from sudden entry are no different from any person's similar interests, both of which may be overcome by officers'



reasonable suspicion. See *Richards*, 117 S. Ct. at 1421. As for the homeowner's interest in avoiding the needless destruction of property, the value of respondent's garage door windowpane is *de minimis*. Thus, even were this Court to conclude that the reasonableness of the no-knock entry must be demonstrated by the totality of the circumstances, that showing is satisfied in this case.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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SEPTEMBER 1997

**APPENDIX**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

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No. CR 94-379HA
INDICTMENT
[18 U.S.C. § 922(g)(1)]

UNITED STATES OF AMERICA
*v.*
HERNAN RAMIREZ, DEFENDANT

---

[Filed Nov. 22, 1994]

---

THE GRAND JURY CHARGES:

On or about November 5, 1994, at Boring, Clackamas County, in the District of Oregon HERNAN RAMIREZ, defendant herein, who had previously been convicted of a crime punishable by imprisonment for a term exceeding one year, as defined in Title 18, United States Code, Section 921(a)(20), namely:

(1) Rape by Force and Violence, on or about May 5, 1978, in the Superior Court of the State of California for the County of Los Angeles, case no. A556567;

(2) Burglary of a Residence While Armed with a Firearm, on or about April 2, 1982, in the Superior Court of the State of

California for the County of Los Angeles, case no. A560936; and

(3) Unlawful Use of Force upon a Peace Officer, on or about July 12, 1983, in the Superior Court of the State of California for the County of Riverside, case no. CR-21026;

did knowingly possess a firearm, namely one or both of the following:

a. a Steyer Mannlicher semiautomatic pistol, SSP 9 X 19, bearing serial number 22504; and

b. a Lorcin semiautomatic pistol, model L380, .380 caliber, serial number 280594;

both of which firearms had previously been transported in foreign and interstate commerce; all in violation of Title 18, United States Code, Section 922(g)(1).

DATED this 22 day of November, 1994.

A TRUE BILL:

/s/ BEVERLY SAUNBERG
BEVERLY SAUNBERG
FOREPERSON

KRISTINE OLSON ROGERS
United State Attorney

/s/ STEPHEN F. PEIFER
STEPHEN F. PEIFER
Assistant United States Attorney

Supreme Court, U.S.
FILED
NOV 5 1997
CLERK

No. 96-1469

In The

# Supreme Court of the United States

October Term, 1997

UNITED STATES OF AMERICA,

*Petitioner,*

v.

HERNAN RAMIREZ,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF FOR HERNAN RAMIREZ

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## ISSUE PRESENTED

In assessing the reasonableness of the officers' decision to make an unannounced entry into a family residence at night by breaking the garage window and by thrusting a firearm inside, must the reviewing court only look to the officers' perceived interest in their safety, or should the court utilize a traditional Fourth Amendment balancing analysis and weigh the need for the governmental intrusion against the occupants' privacy and their interests in safety and preservation of their property?

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## STATEMENT OF THE CASE

### A. The Facts Surrounding The Breaking

In the pre-dawn hours of Saturday, November 5, 1994, Respondent Hernan Ramirez, his wife Cynthia, and his three-year-old son Christopher were asleep in their residence in rural Boring, Oregon. Pet. App. 43a. The house has three bedrooms, a living room, a kitchen, and an attached garage. The property covers several acres and includes, in addition to the home, a large workshop and several trailers. *Id.*

At 6:15 a.m., about forty-five armed law enforcement officers surrounded the residence of Mr. Ramirez and his family. Pet. App. 43a. They came to execute a federal search warrant for one Alan Shelby, who had escaped from custody on November 2, 1994. While en route to testify on an associate's behalf in Tillamook County, Shelby slipped his handcuffs, struck a deputy sheriff, and escaped. Shelby had a history of escapes, violent conduct, and criminal convictions; he had vowed that he would not serve time in a federal prison. *Id.*

On November 3, 1994, agents obtained information from a person termed a confidential, reliable informant that he had seen a person believed to be Shelby on the Ramirez property. Pet. App. 39a. The informant overheard a person named "Alan" say words "approximating" the statement, "I had to knock out a guard." The informant thought nothing of it until he read an article about Shelby's escape in the next day's newspaper; he then contacted ATF Agent Kim. Pet. App. 39a. The informant also indicated Ramirez himself was "possibly" involved in drugs, which he kept in the garage, and that there were "supposed to be" several guns in the garage as well. Pet. App. 43a-44a.

Agent Kim took the informant out to the property, and they saw a man whom "they believed" to be Shelby outside the residence washing a car. Agent Kim described the man they saw as very similar to the photograph of Shelby. Pet. App. 39a-40a. Deputy U.S. Marshal Kauffmann then drove to the Ramirez residence. From "1,000 yards away" Kauffmann saw a person whom he believed was the same person

described by Kim, but he "could not make a positive" identification. *Id.*

On November 4, 1994, Marshal Kauffmann applied for a warrant to search the Ramirez home for Shelby. He sought authorization to serve the warrant at night and without compliance with the knock-and-announce requirement set forth in 18 U.S.C. § 3109. Pet. App. 44a. According to Kauffmann's affidavit, Shelby had attempted an escape in 1991 by striking a corrections officer in the face, assaulting a woman in a parking lot and stealing her vehicle, and ramming a police vehicle with the stolen vehicle. Pet. App. 38a. Shelby had also made threats to kill witnesses and police officers associated with his incarceration and had brutally tortured others in the past with a hammer. Pet. App. 38a-39a. Finally, the affidavit stated Shelby "has had" access to large caches of weapons. Pet. App. 39a. Kauffmann prepared the warrant with "no-knock language," and the Magistrate-Judge signed it. Pet. App. 44a. Between the time of Kauffmann's last "sighting" of Shelby on November 3 and the time of the raid on November 5, the officers received no confirmation of Shelby's presence on the property. Pet. App. 10a.

At the time of the raid, special SWAT teams of state and county officers surrounded the Ramirez property. Pet. App. 44a. One team was responsible for clearing and securing the large workshop building and two of the trailers. Another was responsible for securing the garage area of the residence through the east side window and for securing another trailer. Pet. App. 44a.

Officer Barnum broke out the glass of the garage window. Pet. App. 44a. While he did so, Sergeant VeraCruz shouted several times, "Sheriff's Office, Search Warrant" at the window. Pet. App. 44a. VeraCruz then began to "gunport" the window, that is, aiming and moving his gun through the window, ready to shoot if necessary, but he had trouble when the window's curtain got in his way. *Id.* At about the same time as this activity at the garage window, an officer using a loudspeaker announced the officers' presence and ordered the occupants to come out. Pet. App. 45a. However, an officer who was at the garage window was unable to hear what was



being announced over the loudspeaker because of VeraCruz's yelling. *Id.*

Inside the residence, Mr. Ramirez and his wife were awakened by outside noises and the breaking of glass. Pet. App. 45a. He and his wife "thought they were being burglarized, and they feared for their safety and that of their child who had awakened and who was crying." *Id.* "After hearing the glass breaking," Mr. Ramirez ran to a closet, obtained a gun, and ran to the entrance of the garage. Pet. App. 45a. "In a state of panic," Mr. Ramirez fired toward the ceiling "in an effort to scare away the intruders." *Id.*

The law enforcement officers returned fire and simultaneously shouted, "Police, police." Pet. App. 45a. "Realizing, for the first time, that law enforcement officers were outside and trying to enter his residence," Mr. Ramirez ran to the living room, threw away the firearm across the floor, and "threw himself on the floor in a prone position, shaking from fright." *Id.* Mr. Ramirez stated that had he known the police were trying to enter his home, "he never would have fired the weapon." Pet. App. 46a. Ultimately, Mr. Ramirez and his wife, carrying her child in her arms, walked out of the house into police custody. "Despite a thorough search of the property, the officers did not find Shelby on the premises." Pet. App. 46a.

After receiving and waiving his *Miranda* rights, Mr. Ramirez admitted he was a convicted felon and that he owned the gun that he had fired, as well as another firearm. Pet. App. 46a. He said he had been awakened by noises outside his house and heard the sound of breaking glass. He said he fired up in the air to scare away the persons he thought were trying to burglarize his home. *Id.* Mr. Ramirez said neither he nor his wife had heard any announcement by the officers. Shown a picture of Shelby, Mr. Ramirez said a man resembling Shelby might have been on the property two days earlier. *Id.* Mrs. Ramirez told Kim that she believed she was being burglarized and/or attacked by intruders, and she did not know that the police were trying to enter. *Id.*

Agent Kim used the information furnished by Mr. Ramirez, along with an officer's observation of the gun on the

living room floor, to obtain another search warrant. Executing the second warrant, agents re-entered the residence and retrieved the pistol on the living room floor and a second one in a box as Mr. Ramirez had described. Pet. App. 46a-47a.

The United States Attorney in the District of Oregon obtained an indictment charging Mr. Ramirez with possession of a firearm by a felon, in violation of 18 U.S.C. § 922(g)(1). Mr. Ramirez moved to suppress the two firearms that formed the basis of the charge, and the district court granted the motion. Pet. App. 28a-36a. The court of appeals affirmed. Pet. App. 1a-27a.

### B. The Decision Of The District Court Suppressing The Firearms

The district court rejected Mr. Ramirez's argument that the warrant was not based on probable cause, but granted his motion to suppress on the grounds that the officers had violated both 18 U.S.C. § 3109 and the Fourth Amendment. The court relied on the Ninth Circuit's long-standing test for "exigent circumstances" set forth in *United States v. Becker*, 23 F.3d 1537, 1540-41 (9th Cir. 1994), and *United States v. McConney*, 728 F.2d 1195 (9th Cir.) (*en banc*), *cert. denied*, 469 U.S. 824 (1984). Following *Becker*'s reasoning, the district court acknowledged that "mild exigency," such as knowledge that a person is dangerous, can justify immediate entry into a residence that is accomplished without destruction of property. Pet. App. 32a. To justify destruction of property, however, "more specific inferences of exigency are necessary." *Id.*

The district court found that, although there were specific facts regarding Shelby's propensity to attempt escape, his disdain for federal incarceration, and his past willingness to use threats and violence as means of intimidation, "there was no information that he was armed and dangerous at defendant's home, or that he would present any specific dangers to arresting officers if found there." Pet. App. 34a. The court concluded that there were



> insufficient exigent circumstances to establish that Shelby presented such a threat to the force deployed to apprehend him in the early morning of 5 November as to justify abandoning the "simple and ancient requirement that the officers ought to signify the cause of [their] coming, and to make request to open doors" before destroying property during a governmental intrusion into a person's home.

Pet. App. 34a (citation omitted).

### C. The Decision Of The Court Of Appeals Affirming The District Court

The court of appeals affirmed the district court in a 2-1 opinion. Although the court had "some question" as to the existence of probable cause to believe that Shelby was at the residence, the court assumed it existed. Pet. App. 12a n.1. The court observed that "nowhere is the protective force of the fourth amendment more powerful than when the sanctity of the home is involved." *Id.* at 5a (citations omitted). The Amendment protects the "privacy, the safety, and the property" of our citizens. *Id.* at 6a.

The court founded its analysis on *Wilson v. Arkansas*, 514 U.S. 927 (1995). Citing *Wilson*, the court explained that the knock-and-announce principle "was woven quickly into the fabric of early American law" and that, as a matter of constitutional law, "the method of an officer's entry into a dwelling was among the factors to be considered in assessing the reasonableness of a search and seizure." Pet. App. 6a-7a (quoting *Wilson*, 514 U.S. at 933). The court of appeals stated:

> Our cases do not describe a simple straight line, rather they graph a much more complex curve. Police must have some leeway in balancing the demands of the knock-and-announce requirement against other safety considerations. Nevertheless, the courts must ultimately determine whether the police struck that balance properly.

Pet. App. 11a.

The court stated that the common law tradition finds expression in the federal knock-and-announce rule, codified at 18 U.S.C. § 3109, which allows an officer to break open a door or window of a house to execute a warrant only if, after notice of his authority and purpose, he is refused admittance. "We insist upon this notice," said the court, "because, as individuals, we fear for our privacy in the face of government might, and we fear for our property and our safety as well." Pet. App. 7a. The court reiterated that "the fear of a smashing in of doors by government agents is based upon much more than a concern that our privacy will be disturbed. It is based upon concern for our safety and the safety of our families. . . . " *Id.* (quoting *Becker*, 23 F.3d at 1540).

Citing this Court's admonition in *Sabbath v. United States*, 391 U.S. 585, 589 (1968), the court of appeals explained, "[w]e also fear the needless injuries that might be inflicted upon police officers, or upon a homeowner, as a result of the homeowner's mistaken belief that miscreants are invading his little castle." Pet. App. 7a. The court said a near-tragedy had occurred in the instant case because when the officers executed the warrant, "they brushed aside the wisdom of history and elicited a response which, if not strictly intended, should have been reasonably foreseen." *Id.* at 8a. The court observed:

> Had Ramirez been less reasonable, the officer at the window might have been killed; had Ramirez been less wise, he or his family might have been killed. As it was, his property was needlessly damaged when his home was broken into.

Pet. App. 8a. Elaborating, the court asked rhetorically, "What could [the agents] have expected when they broke into the home of a sleeping family in the early hours of the morning?" *Id.* at 14a. Mr. Ramirez "fired a gun at the ceiling of his own home when unknown intruders were invading it." *Id.* at 16a.

The court of appeals readily agreed that exigent circumstances could justify breaking into a house without notice, but noted that "mere incantation of that phrase" was not sufficient. Pet. App. 16a. It was the duty of the courts to determine "what kind of exigency it was." *Id.* at 8a. The court noted



that, in the case at bar, "an officer broke into the home through a window, poked a gun through the window, and was ready to fire the weapon if he deemed it necessary to do so." *Id.* The court said more than a "mild exigency" was needed to justify this action. *Id.* The court added that to justify physical destruction of property "more specific inferences of exigency are necessary." *Id.* (quoting *Becker*, 23 F.3d at 1541).

In determining the kind of exigency that existed, the court reasoned that the forty-five armed officers did not fear any of the actual residents of the house and were not attacking a gang or cult hangout "where they might be met by a fusillade of gunfire." Pet. App. 9a. They were concerned about one person, Shelby, who "might" be on the premises, but Shelby was "not known to have ever shot or shot at anyone." *Id.* The court explained, "there [was] no suggestion that the police presence was known, no confirmation that Shelby was on the premises and, more importantly, no indication that Shelby was armed and would resist with deadly force." *Id.* at 10a-11a. The court reiterated that the officers "did not know that Shelby had a gun, nor that he had access to one, nor that he would consider using one against them." Pet. App. 11a.

The court stated its review of the case was "necessarily fact bound." Pet. App. 11a. The court concluded by holding that the officers' actions violated both Section 3109 and the Fourth Amendment. Pet. App. 17a.

The dissenting judge disagreed with the majority's result and claimed it was inconsistent with other cases in the circuit. However, the dissent never attacked the soundness of the approach set forth in *Becker* and *McConney*; nor did the dissent assert that the approach conflicted with that employed by any other circuit. Pet. App. 18a-27a.

## SUMMARY OF ARGUMENT

I. Invasion of the home is the "chief evil against which the Fourth Amendment is directed." *United States v. United States District Court*, 407 U.S. 297, 313 (1972). The knock-and-announce requirements help guard against this evil. They

are part of our received wisdom from the common law and part of the Fourth Amendment. *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995). Codified in 18 U.S.C. § 3109, the knock-and-announce requirements are "deeply rooted in our heritage and should not be given a grudging application." *Miller v. United States*, 357 U.S. 301, 313 (1958).

A. The courts below correctly determined that the officers violated both Section 3109 and the Fourth Amendment by breaking the window of the attached garage of the Ramirez family residence during the night and by thrusting a firearm inside. The courts correctly balanced the need for government intrusion against the interests protected by the Fourth Amendment and Section 3109. In assessing the reasonableness of the officers' actions, the court of appeals properly analyzed the totality of the circumstances surrounding the entry and properly considered and weighed the factor of property damage. Contrary to the government's argument, the analysis employed by the Ninth Circuit in the case at bar is fully consistent with *Richards v. Wisconsin*, 117 S. Ct. 1416 (1997), and the mainstream of Fourth Amendment jurisprudence.

In evaluating the reasonableness of the officers' decision not to comply with the knock-and-announce rule, the courts look not only to the officer's state of mind with respect to his safety, as the government suggests, but also to the safety, privacy, and property interests of the occupants. The government acknowledged this principle in the court of appeals, but takes a contradictory position here.

Damage to property directly bears on the reasonableness of the officers' decision to make an unannounced entry, and the government cites no case to the contrary. Prevention of such damage is a fundamental purpose of the knock-and-announce rule. Furthermore, property damage directly bears on officer safety. Another fundamental purpose of the rule is "to safeguard officers who might be mistaken, upon an unannounced intrusion into a home, for someone with no right to be there." *Sabbath*, 391 U.S. at 589. The negative experience with the no-knock law of 1970, the tragedies which led to its speedy repeal in 1974, and the contemporary accounts of tragedies confirm that damage to property directly affects



officer safety. In view of the greater risk to the safety of the officers and residents when property is damaged, the court of appeals properly requires greater justification for a no-knock entry where property is damaged than when it is not. The greater the governmental intrustion on protected interests, the more justification is required.

The government's attempt to divorce the reasonableness of the decision to make an unannounced entry from the manner of the entry makes no sense in this case. The court below decided only a single issue: the decision to make the no-knock entry *by* breaking the garage window was unreasonable.

The reasonableness of the officers' actions must be tested case by case. Therefore, courts should not defer to the officers' decision with respect to how the warrant is executed, particularly where no new facts develop at the scene. Moreover, deference is not desirable because officers are engaged in the "competitive enterprise of ferreting out crime" and are not "neutral" in the manner in which they exercise discretion and judgment.

The approach of the court of appeals reduces the danger to the officers and does not increase it. The government accepted the Ninth Circuit's approach for the last twenty-five years without complaint.

Contrary to the government's assertion, the shattering and the "gunporting" of the window was not "*de minimis*." While the value of the glass was not great, it is the officers' invasion of the sanctity of the home that is not trivial. The officers' action was bound to terrify the sleeping family and cause Mr. Ramirez to defend himself, his wife, and his three-year-old child. It was wholly foreseeable that the officers' action could jeopardize the safety of the officers as well as the family.

B. Even if the court of appeals wrongly considered or wrongly weighed property damage, its result should still be affirmed because there was insufficient evidence Shelby was on the premises at the time of the entry. Furthermore, even had Shelby been there, he would have posed little realistic threat of danger to the forty-five armed officers that were

deployed against him. The district court found that "the officers had no information that Shelby was armed while in the residence or that he would present any specific dangers to arresting officers." This finding was not erroneous.

C. The government concedes that the needless destruction of property can violate the Fourth Amendment. Because the breaking of the window was "needless," the courts below reached the correct result.

II. A. The result below should be affirmed on the separate ground that the knock-and-announce requirement contained in Section 3109 is more restrictive than that embodied in the Fourth Amendment. In fact, Section 3109 contains no exception for officer safety at all. The plain words of the statute contain no such exception. Congress balanced the interests and determined that strict compliance with the requirements best promotes the safety of the officers and the occupants. The legislative history of the statute supports this reading. Moreover, Congressional enactment and repeal of the no-knock law of 1970 shows that, had Congress wanted to legislate an exception for officer safety, it knew how to do so. Finally, Section 3109 embodies the common law at the time of the framing of the Fourth Amendment, which did not recognize an officer-safety exception.

B. Even if Section 3109 contains an officer safety exception, it can be met only upon a showing that the officers had a reasonable belief of "imminent danger" if they complied with the knock-and-announce rule. This standard was enunciated in *Read v. Case*, 4 Conn. 166 (1822), the first case to recognize an officer-safety exception, and it is the standard to which federal law enforcement officers adhere. The government did not meet this standard here.

III. The result below should be affirmed on the additional grounds that the magistrate had no authority to issue a no-knock warrant. As a consequence, the warrant was void *ab initio*.



## ARGUMENT

### I. THE DISTRICT COURT AND COURT OF APPEALS PROPERLY APPLIED THE TOTALITY OF CIRCUMSTANCES TEST AND PROPERLY WEIGHED THE FACTOR OF DAMAGE TO PROPERTY IN DETERMINING THAT THE OFFICERS VIOLATED 18 U.S.C. § 3109 AND THE FOURTH AMENDMENT BY BREAKING THE GARAGE WINDOW AND THRUSTING A FIREARM INSIDE WITHOUT FIRST ANNOUNCING THEIR IDENTITY AND PURPOSE AND WITHOUT BEING REFUSED ADMITTANCE.

The Fourth Amendment to the Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Court has explained, "[i]t is axiomatic that the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *Welsh v. Wisconsin*, 466 U.S. 740, 748 (1984) (quoting *United States v. United States District Court*, 407 U.S. at 313). The Fourth Amendment "preserve[s] that degree of respect for the privacy of persons and the inviolability of their property that existed when the provision was adopted." *Richards v. Wisconsin*, 117 S. Ct. 1416, 1421 n.4 (1997) (quoting *Minnesota v. Dickerson*, 508 U.S. 366, 380 (1993) (Scalia, J., concurring)).

The knock-and-announce rule, codified at 18 U.S.C. § 3109, is part of our received wisdom from the common law. *See Semayne's Case*, 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194, 196 (K.B. 1603) (before an officer may "break the party's house . . . [he] ought to signify the cause of his coming, and make request to open doors"). The rule is predicated on the same core values that animate the Fourth Amendment's protection of the individual's security, privacy and property. The Court's first case addressing Section 3109 established that "the requirements of prior notice of authority and purpose before forcing entry into a home is deeply rooted in our heritage and should not be given grudging application." *Miller*, 357 U.S. at 313. Forty years later, the unanimous Court

made clear that the knock-and-announce rule is part of the Fourth Amendment. *Wilson*, 514 U.S. at 931.

The court of appeals correctly applied these principles in finding that the entry in this case violated both Section 3109 and the Fourth Amendment. In the totality of circumstances, the officers had insufficient justification for shattering the window of the Ramirez home in the pre-dawn hours of the morning and thrusting a firearm inside.

### A. The Court Of Appeals Properly Considered And Weighed Damage To Property As A Factor Among The Totality Of Circumstances.

In assessing the reasonableness of the officers' failure to comply with the knock-and-announce rule, the court of appeals simply engaged in the traditional Fourth Amendment balancing test. Balancing the need for governmental intrusion against the interests invaded by the governmental action is at the core of Fourth Amendment jurisprudence.[1] The Court's recent rejection of any blanket exceptions to the knock-and-announce rule emphasizes the propriety of balancing to evaluate the reasonableness of unannounced entries "under the particular circumstances" of each case. *Richards*, 117 S. Ct. at 1421-22[2]

The "reasonableness" of any police action is always measured "in objective terms by examining the totality of the

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[1] *See, e.g., Tennessee v. Garner*, 471 U.S. 1, 8 (1985); *Delaware v. Prowse*, 440 U.S. 648, 654 (1979) ("the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests"); *Terry v. Ohio*, 392 U.S. 1, 21 (1968); *Camara v. Municipal Court*, 387 U.S. 523, 534-35 (1967).

[2] The Court has previously explained that "a claim under 18 U.S.C. § 3109 depends upon the particular circumstances surrounding the execution of the warrant." *Jones v. United States*, 362 U.S. 257, 272 (1960) (citing *Miller*, 357 U.S. at 301), *overruled on other grounds, United States v. Salvucci*, 448 U.S. 83 (1980).



circumstances."[3] In assessing the circumstances surrounding the unannounced entry here, the court of appeals properly considered Shelby's threats, his history of violence, and his history of escapes. The court also considered that there were "supposed" to be firearms in the garage. In addition, the court considered the following factors: 1) the raid was of a family residence at night; 2) the residence was not fortified or inhabited by a vigilant gang of thugs; 3) there was no confirmation that Shelby was on the property a the time of the entry as he had not been seen for two days and was highly mobile; 4) Shelby was not known to be armed; 5) Shelby had never shot at anyone in the past, much less a police officer; 6) a force of forty-five armed officers was deployed around the residence to prevent Shelby's escape and to put down any resistance; and 7) a window was shattered upon entry, and a firearm was thrust inside – the kind of property damage and invasion of the home that would foreseeably terrorize the homeowner and cause him to act in defense of himself, his wife, and his young child.

The government takes issue with the seventh factor and argues that a totality of the circumstances test that includes property damage as one factor should not be applied in this case. Gov. Br. 27. The government points to the statement in *Richards* that, in order to justify a no-knock entry in a particular case, the police need only have developed a "reasonable suspicion" (as opposed to probable cause) that compliance with the rule would be "dangerous, futile, or inhibit the effective investigation of crime." 117 S. Ct. at 1421-22. Property damage, argues the government, is not relevant to this consideration.

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[3] *Ohio v. Robinette*, 117 S. Ct. 417, 421 (1996); *see Maryland v. Wilson*, 117 S. Ct. 882, 884 (1996) (the "touchstone of our analysis under the Fourth Amendment is always the reasonableness in all the circumstances of the particular governmental invasion. . . . "); *Graham v. Connor*, 490 U.S. 386, 397 (1989) ("as in other Fourth Amendment contexts . . . the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances that confront them").

The government's reliance on the *Richards* dictum is misplaced. *Richards* concerns the "useless gesture" and "destruction of evidence" exceptions to the knock-and-announce rule where unanticipated circumstances developed quickly at the scene. In *Richards*, the defendant not only recognized the police who were at his hotel room door to serve a search warrant for drugs, but also slammed the door in their faces.[4] The Court held that the defendant's "apparent recognition of the officers combined with the easily disposable nature of the drugs" justified the unannounced entry. *Richards*, 117 S. Ct. at 1421. The instant case, by contrast, concerns the assertion of an officer-safety exception in circumstances where the defendant had no knowledge that police were seeking entry to his home, no new facts developed at the scene, and the search was for a person, not readily disposable evidence.

Moreover, *Richards* addresses only the knock-and-announce principle embodied in the Fourth Amendment, not that embodied in 18 U.S.C. § 3109.[5] The government assumes that the two principles and their exceptions are coextensive (Gov. Br. 19-20 n.7), but this Court has never so held.[6] In

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[4] *Richards*, 117 S. Ct. at 1419; *see Miller*, 357 U.S. at 310 (when occupant already knows purpose of police presence, announcement would be "useless gesture").

[5] The Fourth Amendment's knock-and-announce requirement can "give way under circumstances presenting a threat of physical violence." *Richards*, 117 S. Ct. at 1420 (quoting *Wilson*, 514 U.S. at 936). Other exceptions include: "(1) where the persons within already know of the officers' authority and purpose, or (2) where the officers are justified in the belief that *persons within* are in imminent peril of bodily harm, or (3) where those within, made aware of the presence of someone outside (because, for example, there has been a knock at the door), are then engaged in activity which justifies the officers in the belief that an escape or the destruction of evidence is being attempted." *Ker v. California*, 374 U.S. 23, 47 (1963) (Brennan, J., dissenting) (emphasis added).

[6] *See Wilson*, 514 U.S. at 934 n.3 ("in *Miller*, our discussion focused on the statutory requirement of announcement found in 18 U.S.C. § 3109, not on the constitutional requirement of reasonableness"); *Ker*, 374 U.S. at 38 (reasonableness standard of the Fourth Amendment, rather than Section 3109, governs how state officers enter a suspect's home).



fact, the Court has never held that Section 3109 contains any exception for officer safety at all.[7] Significantly, *Amicus* Ohio, *et al.* ("Ohio") specifically does not address the application of Section 3109 because the states are affected only by Fourth Amendment law. *Amicus* Ohio Br. 1.[8]

The Ninth Circuit's approach in the case at bar is fully consistent with the holdings and dictum in *Richards*. The court of appeals correctly analyzed the reasonableness of the officers' beliefs and suspicions under the totality of circumstances that existed at the time of the entry.

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[7] *See Sabbath*, 391 U.S. at 591 (not necessary to decide issue because facts do not show officer at risk); *Miller*, 357 U.S. at 309 (whether the "unqualified requirements" of the rule admit of an exception justifying noncompliance in exigent circumstances "is not a question we are called upon to decide in this case"). In dictum, the *Sabbath* Court suggested that the "limited exceptions" identified by Justice Brennan in *Ker* might also apply to Section 3109. The Court stated:

> Exceptions to any possible constitutional rule relating to announcement and entry have been recognized, *see Ker v. California*, 374 U.S. at 47 (opinion of Brennan, J.), and there is little reason why *those limited exceptions* might not also apply to Section 3109, since they existed at common law, of which the statute is a codification.

*Sabbath*, 391 U.S. at 591 n.8 (emphasis added). Tellingly, the limited exceptions set forth by Justice Brennan do not include officer safety. *See also Wong Sun v. United States*, 371 U.S. 471, 484 (1963) ("the Government claims no extraordinary circumstances – such as the imminent destruction of vital evidence, or the need to rescue a victim in peril.").

[8] In Part II of this brief at p. 41, Mr. Ramirez argues that the result below should be affirmed on the ground that the knock-and-announce requirements of Section 3109 are more restrictive than those embodied in the Fourth Amendment. For purposes of the present argument, however, Mr. Ramirez, like the government, assumes the knock-and-announce requirements contained in Section 3109 and those embodied in the Fourth Amendment are coextensive.

### 1. In Evaluating The Reasonableness Of The Decision To Make An Unannounced Entry, The Courts Do Not Look Only To Officer Safety But Also To The Occupants' Safety And The Preservation Of Their Privacy And Property.

The government asserts that the need to damage property in making an unannounced entry "has no bearing" on the law enforcement interests that justify the entry. Gov. Br. 17. The government implies that, under *Wilson* and *Richards*, the Court must evaluate the reasonableness of the officers' decision not to comply with the knock-and-announce rule by considering *only* the officer's state of mind with respect to his safety and not to other circumstances like the safety of persons in the house or damage to the homeowner's property. This is incorrect and a misreading of *Wilson* and *Richards*. As important as the interests in officer safety are, they nevertheless "stand in constant tension with the Constitution's protections of the individual against certain exercises of official power." *Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973). That is to say, the safety, privacy, and property interests of the occupants of the dwelling must also be considered.

Moreover, in the court of appeals, the government took a different view of the relevance of damage to property. In its petition for rehearing *en banc*, the government contested only the Ninth Circuit's supposed according of "dispositive significance" to property damage, but urged that the law should consider "the extent of property damage . . . as a single factor in the reasonableness balancing test required by the Supreme Court's decision in *Wilson*."[9] The government's assertion in the court of appeals contradicts its position in this Court and was a correct statement of the law: damage to property is

[9] *See* Lodged Document E at 12-13 (Pet. For Rehearing *En Banc*).



clearly "a single factor" in assessing the reasonableness of the decision not to comply with the knock-and-announce rule.[10]

#### a) A Fundamental Purpose Of The Knock-And-Announce Rule Is To Prevent Damage To Property.

Damage to property is an important factor in assessing the reasonableness of an unannounced entry. The Court emphasized in *Richards* that the individual's interest in avoidance of damage to property "should not be minimized . . . [and is] not inconsequential." *Richards*, 117 S. Ct. at 1421 n.5. In fact, the ancient common law rule requiring announcement of identity and purpose was justified in part by the belief that announcement would avoid the "*destruction or breaking of any house . . . by which great damage and inconvenience might ensue.*" *Wilson*, 514 U.S. at 931 (quoting *Semayne's Case*, 5 Co. Rep. at 91a-91b, 77 Eng.Rep. at 195-96 (emphasis added)). Even the government acknowledges, as it must, that "one of the interests that underlie the knock-and-announce principle is the avoidance of damage to property." Gov. Br. 13, 24 n.9 (quoting *Wilson*, 514 U.S. at 931); *see generally* 2 Wayne R. LaFave, *Search and Seizure* § 4.8(a) at 599 (3d ed. 1996) ("preventing the physical destruction of property [is one of the three] most worthwhile" goals underlying the rule).

Every Circuit court that has addressed the issue agrees that prevention of damage to property is one of the three

[10] Under the government's current logic, the fact that the entry here occurred at night would also be irrelevant. Yet it is clear that framers of the Fourth Amendment condemned nocturnal entries and searches. *See* William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning* (1990) at 1346, 1510-11 (unpublished Ph.D. dissertation, at Claremont Graduate School); *cf. United States v. Jerez*, 108 F.3d 684, 690 (7th Cir. 1997) ("when a knock at the door comes in the dead of night, the nature and effect of the intrusion into the privacy of the dwelling place must be examined with the greatest of caution"). The government's effort to eliminate the factor of property damage is not only illogical, it is dangerous.

fundamental interests safeguarded by Section 3109. As recently stated by the Sixth Circuit:

> As recognized by other Circuits addressing this issue, the interests protected by § 3109 include: (1) the reduction of potential for violence to both the police officer and the occupants of the house into which entry is sought; (2) the needless destruction of private property; and (3) a recognition of the individual's right to privacy in his house.

*United States v. Bates*, 84 F.3d 790, 794 (6th Cir. 1996).[11] These interests are "not debatable." *United States v. Brown*, 52 F.3d 415, 421 (2d Cir.1995), *cert. denied*, 116 S. Ct. 754 (1996).

Given that a fundamental purpose of the knock-and-announce rule is the prevention of damage to property, it makes no sense to say, as the government now does, that in determining whether officers comply with the rule, they (and the reviewing courts) may not consider damage to property under the totality of circumstances surrounding the entry. The government fails to cite to a single case, federal or state, so holding.[12]

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[11] *Accord Kornegay v. Cottingham*, 120 F.3d 392, 396 (3rd Cir. 1997); *Bonner v. Anderson*, 81 F.3d 472, 474 (4th Cir. 1996); *United States v. Kemp*, 12 F.3d 1140, 1142 (D.C. Cir. 1994); *United States v. Ruminer*, 786 F.2d 381, 383 (10th Cir. 1986).

[12] The government argues that *Sabbath* supports the conclusion that damage to property is irrelevant to the decision to make an unannounced entry. Gov. Br. 19-20. *Sabbath* holds that damage to property in effecting an unannounced entry is not necessary to trigger the requirements of Section 3109. The government observes that *Sabbath* did not suggest that because no property was damaged, a "mild exigency" would have sufficed to justify the unannounced entry. The government's logic is faulty. Because there was no property damage in *Sabbath*, the Court had no need to, and did not, focus on the law that would have applied had there been such damage.



**b) Damage To Property Directly Bears On Officer Safety.**

The government is incorrect when it argues that damage to property "has no bearing on the presence of the law enforcement interests that justify th[e] entry." Gov. Br. 17. Damage to property directly bears on the officers' interest in safety. The law protects property not merely for the value of the property itself, but because of the wholly foreseeable dangers to the officers that can flow from damage to property during an unannounced entry. The common law recognized that the unannounced breaking into a man's home "must tend to create breaches of the peace by provoking resistance." *Ratcliffe v. Burton*, 3 Bos. & Pul. 223, 230, 127 Eng. Rep. 123, 126-27 (K.B. 1802). This in turn obviously puts the officer at great risk.

This was particularly true, as in the instant case, where officers sought to search for a fugitive in the home of a presumptively innocent third party. As so cogently expressed in *Ratcliffe* by Judge Heath:

> The law of England, which is founded on reason, never authorizes such outrageous acts as the breaking open every door and lock in a man's house without any declaration of the authority under which it is done. *Such conduct must tend to create fear and dismay, and breaches of the peace by provoking resistance.* This doctrine would not only be attended with great mischief to the persons against whom process is issued, but to other persons also, since it must equally hold good in cases of process upon escape, where the party has taken refuge in the house of a stranger. *Shall it be said that in such case the officer may break open the outer door of a stranger's house without declaring the authority under which he acts, or making any demand of admittance? No entry from the books of pleading has been cited in support of this justification, and Semayne's case is a direct authority against it.*

*Id.* (emphasis added).[13] The reasoning at common law was that violence was bound to follow an unannounced entry:

> . . . for if no previous demand is made, how is it possible for a party to know what the object of the person breaking open the door may be? He has a right to consider it as an aggression on his private property, which he will be justified in resisting to the utmost.

*Launock v. Brown*, 2 B. & Ald. 592, 594, 106 Eng. Rep. 482, 483 (K.B. 1819). This understanding leads directly to this Court's repeated observation that one fundamental purpose of Section 3109 is "to safeguard officers who might be mistaken, upon an unannounced intrusion into a home, for someone with no right to be there." *Sabbath*, 391 U.S. at 589.[14]

As stated by one court, while law enforcement officials "might be thought quite capable of protecting their own safety . . . Congress could reasonably have concluded that a directive such as Section 3109 would enhance the safety of law enforcement officials."[15] Statutes in every jurisdiction

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[13] *See also Hair v. United States*, 289 F.2d 894, 896 n.8, 110 U.S. App. D.C. 153, 155 (D.C. Cir. 1961) (that the home belonged to a person other than person sought "is of some significance" in determining the validity of the unannounced entry).

[14] *See Miller*, 357 U.S. at 313-14 n.12 (compliance with Section 3109 "is also a safeguard for the police themselves who might be mistaken for prowlers and be shot down by a fearful householder"); *Ker*, 374 U.S. at 58 (Brennan, J., dissenting) ("one of the principal objectives of the English requirement of announcement of authority and purpose was to protect the arresting officers from being shot as trespassers"); *cf. McDonald v. United States*, 335 U.S. 451, 460-461 (1948) (Jackson, J., concurring) ("many home-owners in this crime-beset city doubtless are armed . . . [the home-owners'] natural impulse would be to shoot [a perceived stranger entering the house]").

[15] *United States v. Nolan*, 718 F.2d 589, 596 n.10 (3rd Cir. 1983); *see United States v. Pratter*, 465 F.2d 227, 233 n.16 (7th Cir. 1972) ("strict compliance with the statute is a protection to the safety of the arresting officers and to the effective accomplishment of their mission"); *see also*



excuse violence when directed against invaders of the home. *See, e.g.*, Or. Rev. Stat. §§ 161.205(5), 161.219(2), 161.225 (homeowner may use deadly force to protect persons and property if reasonably necessary). Given the widespread ownership of guns in the country, the unannounced breaking into a house, particularly at night, is obviously fraught with great danger to both police and residents.[16]

### c) The Negative Experience With The No-Knock Law Of 1970 Confirms That Damage To Property Directly Affects Officer Safety.

In 1970, Congress enacted legislation authorizing magistrates to issue "no-knock" warrants in drug cases if the magistrate found probable cause to believe that compliance with the knock-and-announce rule would lead to the destruction of evidence or "[would] immediately endanger the life or safety of the executing officer or another person."[17] Congress repealed the law barely four years later, "when Congress

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LaFave, *supra*, at 599 and cases cited therein ("an unannounced breaking into a home could quite easily lead an individual to believe that his safety was in peril and cause him to take defensive measures which he otherwise would not have taken had he known that a warrant had been issued to search his home").

[16] One recent report states that thirty-five percent of U.S. households own guns. (News Release, March 5, 1997, quoting National Institute of Justice, *Guns in America: National Survey on Private Ownership and Use of Guns* (1997)), 1997 WL 222777. Forty-four million Americans own 192 million firearms. *Id.* Other polls suggest the figure is closer to 50%. Thomas McAffee, *Bringing Forward the Right to Keep and Bear Arms*, 75 N.C. L. Rev. 781, 899 (1997) (citing polls). In Oregon, an estimated 51% of all households own guns. *This Week's Question: Do You Think It Is Safe to Have a Loaded Gun in the House?* The Oregonian (July 31, 1997) 1997 WL 4194863.

[17] *See* Section 509(b) of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub.L. 91-513, 84 Stat. 1236, 1274 (codified at 21 U.S.C. § 879(b) (1970) (repealed).

learned" that no-knock warrants created a "staggering potential for violence to both occupants and police." LaFave, *supra*, at 622 n.111 (quoting *State v. Bamber*, 630 So.2d 1048, 1050 (Fla. 1994)).[18]

Indeed, during the four-year period when no-knock warrants were issued, "horror stories were legion." *Bamber*, 630 So.2d at 1050 n.4 (quoting Charles Garcia, *The Knock and Announce Rule: A New Approach to the Destruction of Evidence Exception*, 93 Colum. L. Rev. 685, 703-05 (1993)).

> Over 100 newspaper articles reproduced in the Congressional Record, described a repeated scenario: terrified citizens, thinking themselves targets of burglary or more frightening acts, discovered that they were instead being searched by law enforcement officers who had entered their home without notice. In an exhaustive eight-week investigation by The New York Times, consisting of interviews with victims of "no-knock" raids, reporters found that "[i]nnocent Americans around the country have been subject to dozens of mistaken, violent and often illegal police raids by local, state and federal narcotics agents in search of illicit drugs and their dealers."

*Bamber*, *supra*; *see* 120 Cong. Rec. 22,886-88 (1974) (N.Y. Times Article); *see also* 120 Cong. Rec. 26,874 (1974) (Wall St. J. Article); 119 Cong. Rec. 15,170-76 (1973) (numerous articles and letters to Senator Ervin).

Before passage of the repealing legislation, House and Senate committees extensively documented the abuses brought about by four years of no-knock warrants. The House Committee noted, for example, "several instances in which Department of Justice enforcement agents in their eagerness to crush illicit drug trafficking have mistakenly broken into the homes and apartments of dozens of innocent families, terrorizing the occupants and heavily damaging property." H.

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[18] *See* Extension of Controlled Substances Act, Pub.L. 93-481, § 3, 1974 U.S.C.C.A.N. (88 Stat.) 1455, 1455-56.



R. Report No. 93-1248, at 6, 8 (1974); *see also* 120 Cong. Rec. 26,780 (1974). The Committee determined that law enforcement agencies were showing "a lack of discretion and attention to alternative methods of securing evidence on the part of the Department of Justice." H.R. Report at 8. According to the Committee, one of the reasons that repeal was warranted was that the empirical evidence showed that rather than reducing violence, no-knock warrants did the opposite: "rather than protecting the lives of agents [they had] in several instances resulted in serious injury and death of law enforcement officers and civilians." H.R. Report, *supra*, at 8; *see also* 120 Cong. Rec. 26,781 (1974).[19] Some of the tragedies caused by no-knock warrants were reported in the Congressional Record twenty-five years ago.[20] One was described as follows:

> In Norfolk Virginia at 3:00 a.m., on May 24, 1972, Mrs. Lillian Davidson, a previous burglary victim, heard someone breaking in her home. Then someone began to batter down her locked bedroom door. She grabbed a .32 caliber revolver and shot through the door. The bullet pierced the chest of Patrolman Lewis Hurst, Jr., the 22-year-old son of the head of the Norfolk Police Department Narcotics Squad. He died minutes later. The police arrested Mrs. Davidson. They were looking for 2,400 parcels of heroin that an informer had said were there. They were not. The police said it had been an error.

### d) Violation Of The Knock-And-Announce Rule Continues To Endanger, Rather Than Protect, Law Enforcement Officers And Civilians.

Unfortunately, needless tragedies among police and civilians alike continue to occur with alarming frequency because

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[19] In 1974, the Senate voted to repeal the no-knock statute by a 2 to 1 margin. Garcia, 93 Colum. L. Rev. at 703.

[20] 120 Cong. Rec. 22,886-88 (July 11, 1974) (excerpt from Exhibit 1, news article by Andrew Malcolm).

of destruction of property associated with noncompliance with the knock-and-announce rule. For example, in 1993, another person, ironically also named "Ramirez," and a police officer were not so lucky as the participants here. At 2:00 a.m. on January 25, 1993, without prior announcement, police smashed down the door and rushed into the home of Manuel Ramirez of Stockton, California.[21] Ramirez "awoke, grabbed a pistol, and shot and killed one policeman by his bedroom door before other police killed him."[22] The police were raiding the house based on a tip that drugs were on the premises, but they found none.

On March 25, 1994, the Reverend Accelynne Williams, a retired Methodist minister, "was enjoying the peace and security of his home" in the Boston, Massachusetts neighborhood of Dorchester:

> Without warning, thirteen armed Boston police officers burst into his apartment. Frightened, the Reverend ran into his bedroom; the officers continued the chase and smashed through his bedroom door. After wrestling with Reverend Williams, the officers clinched handcuffs around his wrist. Unable to withstand the shock of the intrusion, the seventy-five-year old minister suffered a fatal heart attack. Only then did the police officers discover they had made a mistake: They had invaded the wrong apartment; the Reverend's home did not contain the drugs for which the police were searching.[23]

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[21] *See* James Bovard, *Lost Rights*, p. 236 (St. Martins Press 1994) (citing Stanton, *Stockton Man, Cop Die; Family Blames Mistake*, SACRAMENTO BEE, January 26, 1993).

[22] *Id.*

[23] Jennifer Goddard, *The Destruction of Evidence Exception to the Knock and Announce Rule: A Call for Protection of Fourth Amendment Rights*, 75 B.U.L.Rev. 449 (1995).



The Ramirez and Williams' tragedies are but two of the many that have occurred.[24] These tragedies illustrate the correctness of the Ninth Circuit's approach: the attendant dangers to both civilians and police require more specific evidence of danger to the officers to justify breaking in a door or window in making an unannounced entry than when they do not. It is no doubt true that officers (and innocent civilians) are killed whether or not the officers comply with the knock-and-announce principle. *See Amicus* Americans for Effective Law Enforcement ("AELE") Br. at 6-7 (citing four incidents). The empirical evidence gathered by Congress, however, and its consequent repeal of the no-knock law of 1970, together with the contemporary accounts of officer and civilian deaths, strongly support the conclusion that compliance with the knock-and-announce rule causes far fewer deaths than non-compliance. Senator Sam Ervin put the matter succinctly:

> I know of no provision of law which puts officers of the law in more jeopardy of life and limb than . . . "no-knock" searches of the homes of our citizens. *When someone attempts to break into the dwelling house of the average citizen in the night time, the average citizen is not going to wait to ascertain whether it is an officer of the law or whether it is a burglar. He is going to resist to the*

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[24] For example, in December of 1992, a heavily armed force of drug agents shot and almost killed Donald L. Carlson, a Fortune 500 company executive, when they broke into his home looking for drugs. *See* Philip J. LaVelle, *Excesses Blamed on "Bad" Raids*, SAN DIEGO UNION-TRIBUNE (December 13, 1992) 1992 WL 4766590. Aroused from a deep sleep, Carlson wounded an officer as he fired in self-defense at persons he perceived to be criminal intruders; he was himself wounded three times. *Id.* at 3. No drugs were found. *Id; see also Drug Raid Shooting Victim Wins $225,000 Settlement*, DENVER POST (April 3, 1996), 1996 WL 6689450 (on April 2, 1996, armed officers broke into the home of Juan Rocha-Gallegos and shot him seven times in the chest, arms and legs during a no-knock drug raid). Other incidents described in news articles assembled in Lodged Document G; *see also* Bovard, *supra* note 21, at 233-37 (describing other incidents).

> *utmost, even to the taking of lives.* . . . It is ridiculous to say that breaking in without notice serves as protection for the police officer. The contrary is true. He is more likely to lose his life if he attempts to break in without notice.[25]

Contrary to the government's argument, property damage directly bears on the officers' interest in safety.[26]

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[25] 120 Cong. Rec. 22,884 (1974) (emphasis added); *see also* Remarks of Representative Tim Lee Carter, 120 Cong. Rec. 26,781 (1974) ("In the area which I come from, if a man knocks the door down and goes in [without notice], he usually comes out feet first and the undertaker takes care of him. A man's house is his castle.").

[26] The government seeks to minimize the individual's interest in his property, arguing that the "principal object of the Fourth Amendment is the protection of privacy rather than property." Gov. Br. 18 (quoting *Soldal v. Cook County*, 506 U.S. 56, 64 (1992)). This contradicts the government's position, taken elsewhere in the brief, that excessive or "wholly unnecessary" property damage may indeed constitute a Fourth Amendment violation. Gov. Br. 23-24. In any event, the government takes the quotation from *Soldal* out of context and entirely misconstrues the case. In *Soldal*, the Court rejected the claim that the Fourth Amendment is primarily concerned with privacy rights as opposed to property rights. Indeed, the holding of the case was that the eviction of a tenant by means of seizing and moving his trailer did state a Fourth Amendment violation as a basis for a Section 1983 suit even though there was no invasion of privacy. The Court nowhere suggests the interest in property is less worthy of protection than privacy, but emphasizes the contrary: "our cases unmistakably hold that the Amendment protects property as well as privacy." 506 U.S. at 62. Furthermore, in *Richards*, the Court affirmed that "[t]he purpose of the Fourth Amendment's requirement of reasonableness is to preserve that degree of respect for the privacy of persons *and the inviolability of their property* that existed when the provision was adopted." 117 S. Ct. at 1421 n.4 (emphasis added). The Court admonished that the homeowner's interest in property is "not inconsequential" and should not be "unduly minimized." 117 S. Ct. at 1421 n.5; *see also* II Joseph Story, *Commentaries on the Constitution of the United States*, § 1902 (5th ed. 1891) (Fourth Amendment "seems indispensable to the full enjoyment of the right of personal security, personal liberty, and private property").



### 2. The Court Of Appeals Properly Requires More Evidence Of Danger To Justify Damage To Property.

The court of appeals correctly requires more evidence of danger to the officer to support a no-knock entry where property is damaged than when it is not. Damage to property is both a fundamental concern of the knock-and-announce rule and a much greater intrusion on the citizen's privacy. Furthermore, as previously shown, damage to property is more likely to result in death or injury to the police and the residents than if there is no such damage. Therefore, where property has been damaged, greater justification is required for the no-knock entry than were there no such damage. This weighing is at the core of Fourth Amendment jurisprudence: the greater the governmental intrusion on the individual's protected interests, the more justification is required. *See supra*, at 13, 14.

Circuits that have considered the question of property damage have expressed views consistent with that of the Ninth Circuit, even if none use the specific language that the Ninth Circuit employs. For example, the Tenth Circuit has observed that the conclusion of exigency "must be *especially clear* . . . where the destruction of physical property [takes] place." *United States v. Stewart*, 867 F.2d 581, 584 (10th Cir. 1989) (emphasis added). This language suggests that the Tenth Circuit, like the Ninth, requires more justification for an unannounced entry when damage occurs than when it does not.[27]

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[27] The government has taken the view that the statement in *Stewart* should carry no weight because a subsequent case, *United States v. Maden*, 64 F.3d 1505 (10th Cir. 1995), shows that the Tenth Circuit does not require a greater evidentiary showing of danger when property is damaged. Pet. Cert. Reply at 3. While the court in *Maden* did say that it did not read *Stewart* to impose a specific showing of exigency for no-knock searches, these comments are questionable *dictum: Maden* involved no property damage at all because the police entered with a passkey. *Id.* at 1506-07.

Similarly, the Second Circuit has stated that one of the "touchstones" for determining the existence of exigent circumstances is "the peaceful circumstances of the entry." *Brown*, 52 F.3d at 421. This language also suggests that a heightened standard applies when there is destruction of property. *See also Dorman v. United States*, 435 F.2d 385, 393 (D.C. Cir. 1970) (reasonableness of warrantless, unannounced entry into home to look for fugitive, depends partly on whether entry made "peaceably"); *King v. Marmon*, 793 F. Supp. 1030, 1033 (D. Kansas 1992) ("courts have found that . . . more specific inferences of exigency are necessary when physical disruption of property is required").[28]

The government argues that, in other search-and-seizure contexts, the Court has never required a greater justification on the officers' part if their actions result in damage to property. Gov. Br. 19. By way of example, the government asserts that a pat-down search would not require probable cause, as opposed to reasonable suspicion, even if the officers intentionally tear the suspect's jacket during the search. *Id.* By way of further example, the government posits that the

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[28] *Amicus* Ohio asserts that "none of the States has ever distinguished" between no-knock entries that require property damage and those that do not. *Amicus* Ohio Br. 9. This is not true as even the government's brief demonstrates. Gov. Br. 18 n.6. For example, in *State v. Ogden*, 640 A.2d 6 (Vt. 1993), the court affirmed a no-knock entry primarily on the ground that there was no destruction of property. The court said "where the police have knocked and announced their identity and purpose, an exigency may justify immediate entry if that entry can be accomplished without physical destruction of property." 640 A.2d at 9-10 (citing *McConney*, 728 F.2d at 1206). Similarly, in *Trosper v. State of Alaska*, 721 P.2d 134, 135 (Alaska Ct. App. 1986), the court observed that where there was no destruction of property only a "mild" exigency was required to excuse noncompliance with the knock-and-announce principle. *See also State v. Moore*, 535 N.W.2d 417, 421-22 (Neb. Ct. App. 1995) (agreeing with Ninth Circuit's approach and requiring officers to make showing of greater risk of danger when physical destruction of property is necessary); *People v. Mendoza*, 176 Cal. App. 3d 1127, 1131 (1986) ("[e]ven a mild exigency would have justified" the police having opened the door without breaking it – citing *McConney*).



intentional breaking of an object during a protective sweep of a home would not invalidate the underlying warrant. *Id.*

The government's assertions contradict its position taken elsewhere in its brief that excessive or "wholly unnecessary" damage can violate the Fourth Amendment. Gov. Br. 23-24. If the defendant's clothing were intentionally torn during a pat-down, or if his property were intentionally broken during a sweep of the home, a court would surely hold that the officer's intentional misconduct was unreasonable because it went beyond the scope of what initially justified the pat-down or sweep.[29] Furthermore, the government's examples are inapposite because neither a pat-down search nor a protective sweep is governed by the requirements of the knock-and-announce principle, one of whose fundamental purposes is the protection of the individual's home against invasion and damage.

Finally, the government cites *no* case, federal or state, even suggesting, much less holding, that in determining the objective reasonableness of the officers' decision to make an unannounced entry to search for a fugitive, the reviewing court may not require more specific evidence of the fugitive's presence and danger in order to justify damage to property.[30]

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[29] *Cf. Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993) ("if the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry* and its fruits will be suppressed"). Even if there were no evidence to suppress, civil liability would arise for the Fourth Amendment violation.

[30] *Amicus* Ohio argues that the approach of the court of appeals discriminates against the poor, the forgetful and the trusting because they cannot afford, do not remember, or choose not, to lock their doors: the Fourth Amendment right to privacy, runs the argument, should apply to every group and should not depend on the fortuity of a locked door. *Amicus* Ohio Br. 12. The short answer to this argument is that the right of privacy does belong to all groups, but the officers' and the residents' interest in safety is different in the case of a locked door and an unlocked door. As shown above, the breaking of a door (or window) greatly magnifies the chances that a resident will act in self defense, thereby jeopardizing the safety of both the officers and the occupants.

### 3. Damage To Property Bears On The Decision Whether To Make An Unannounced Entry As Well As The Manner Of Entry.

The government argues that damage to property implicates only the manner in which the unannounced entry is made, not the initial decision whether to enter. Gov. Br. 24 n.9. In a related argument, *Amicus* Ohio asserts that the approach of the court of appeals establishes an unprecedented "multi-exigency" requirement. Under this approach, argues *Amicus*, the officers must first establish exigent circumstances to make an announced entry, and, second, additional exigent circumstances to justify the manner of entry if that includes the destruction of property. *Amicus* Ohio Br., *passim*.

The government and *amicus* misapprehend the approach of the court of appeals. The court asks a single question: under the totality of circumstances, was the decision to make a no-knock entry *by breaking the garage window* reasonable? The Ninth Circuit answered this question in the negative.[31] The attempt by the government to divorce the reasonableness of the decision to make an unannounced entry from the manner of entry makes is not persuasive. First, the government concedes that "the reasonableness of a [police action] depends not only on when it is made, but also on how it is carried out."[32] Furthermore, in *Wilson*, the Court held that, as a matter of constitutional law, "the method of an officer's entry into a dwelling" was among the factors to be considered

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[31] The Ninth Circuit's use of the specific terminology "mild exigency" or "more specific inferences of exigency" does not constitute a different, "two-tiered" test, as the government claims. This terminology is simply the court's means of distinguishing among the kinds of exigencies that exist – in this case, the kind and degree of danger that Shelby realistically presented to the officers when viewed from the perspective of a reasonable officer under the totality of the surrounding circumstances.

[32] Gov. Br. 24 n.9 (quoting *Graham v. Connor*, 490 U.S. at 395 ); *see Tennessee v. Garner*, 471 U.S. at 8 (court rejects state's argument that, where the police killed a suspected burglar after he refused to halt, the Fourth Amendment had nothing to say about how the seizure was made).



in assessing the reasonableness of a search and seizure. *Wilson*, 514 U.S. at 934.

Second, the decision to break the garage window here was an inseparable part of the decision to make an unannounced entry. No new facts arose on the scene. The officers did not decide first to make an unannounced entry, and only then consider the manner of such entry. The plan for the execution of the warrant provided that one SWAT team "would be responsible for securing the garage area of the residence *through* the East side window." Pet. App. 44a (emphasis added). Thus, the officers made one decision: entry was to be made *by* breaking the window.

Third, the "ruse" cases demonstrate the fallacy of the government's argument that damage to property has no bearing on the decision to make an unannounced entry. Entry by ruse is approved precisely because damage to property is avoided, thereby achieving one goal of the knock-and-announce law. *See Sabbath*, 391 U.S. at 590 n.7 (ruse entries "involve[] no breaking").[33]

### 4. The Courts Should Not Defer To The Officers' Decision As To How Entry Should Be Made, Particularly Where No New Facts Developed At The Scene.

Respondent recognizes the weighty interest in officer safety. This does not mean, however, that the Court should, as the government urges (Gov. Br. 22), defer to the contemporaneous assessment by police of the various risks they face and the resulting choice of method of entry of a family residence, particularly where no new facts develop at the scene. The government's request runs counter to the weight of Fourth

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[33] As recently stated by one court, a ruse entry "actually promotes both the purpose of preventing violent confrontation between the officer and the surprised occupant and *that of preventing unnecessary property damage*." *State v. Dixon*, 924 P.2d 181, 190 (Haw. 1996) (emphasis added); *State v. Myers*, 689 P.2d 38, 42 (Wash. 1984).

Amendment law and this Court's recent pronouncement in *Richards* that "it is the duty of a court confronted with the question to determine whether the facts and circumstances of the particular entry justified dispensing with the knock-and-announce requirement." *Richards*, 117 S. Ct. at 1421.

Deference is also not desirable because the law recognizes that law enforcement officers are engaged in the "competitive enterprise of ferreting out crime" and thus are hardly "neutral" in the manner in which they exercise their discretion and judgment. *See Johnson v. United States*, 333 U.S. 10, 13-14 (1948). At best, the officers "may lack sufficient objectivity to weigh correctly the strength of the evidence supporting the contemplated action against the individual's interest in protecting his own liberty and the privacy of his home." *Steagald v. United States*, 451 U.S. 204, 212 (1981). At worst, they may be highly anxious and excited before executing a warrant involving the forced entry into a family residence at night. In such circumstances, the judgment of officers as to what is in their best interests, not to mention the interests of others, is bound to be clouded. *See United States v. Lefkowitz*, 285 U.S. 452, 464 (1932) (questioning the "caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime").

The government argues that officers must often make "split-second" judgments in the field, and suggests that such judgments should not be second-guessed by armchair judges. Gov. Br. 22. This argument diminishes the separation of powers principle and has been rejected before in numerous contexts. *See, e.g., Graham*, 490 U.S. at 396-97 (even though police "often forced to make split-second judgments" as regards to amount of force used to make arrest, decision still subject to "reasonableness" test). To be sure, judicial review must take into account the pressures and time restrictions under which officers sometimes operate. *Id.* This does not mean, however, that police conduct is free from judicial



scrutiny. *Id*; *see Terry*, 392 U.S. at 29, 30 (a frisk must "be confined in scope" and "carefully limited").[34]

In any event, in the instant case, there was no necessity for any "split second" decision making at all. The warrant was applied for and issued on November 4, and the officers chose the date and time for its execution. The officers had ample time to assemble forty-five officers and to formulate a detailed plan regarding the execution of the warrant. *See* Pet. App. 44a (detailing assignments of the SWAT teams); *see Stewart*, 867 F.2d at 585 ("[i]t is difficult to understand how the circumstances were 'exigent' when the officers had an entire day to formulate a response to [the] circumstances."). Importantly, no new facts developed at the scene which required the exercise of "split-second" judgment calls.[35]

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[34] While police are not required "to take unnecessary risks in the performance of their duties," *Terry*, 392 U.S. at 23, they are expected to take *necessary* risks. This is an inherent part of police work. The fact is that the police are always at risk and make frequent split-second decisions in all aspects of their work.

[35] The government and *Amicus* AELE rely on *Dalia v. United States*, 441 U.S. 238 (1979), for the proposition that the method used in executing a warrant is generally left to the discretion of the officers. Gov. Br. 17, *Amicus* AELE 3. This reliance is misplaced for several reasons. First, *Dalia* admonishes that the discretion is "subject of course to the general Fourth Amendment protection against unreasonable searches and seizures." *Dalia*, 441 U.S. at 257; *see Stewart*, 867 F.2d at 583 (*Dalia* does not mean that discretion is "without limitation" as the action taken "must be within statutory and constitutional limitations").

Second, the government raised the same argument in its *amicus* brief in *Richards*. *See* Gov. *Amicus* Br., 1997 WL 106423 at 54-55. The Court implicitly rejected the argument by making clear that reviewing courts must engage in a case-by-case reasonableness analysis of the execution of the warrant. *Richards*, 117 S. Ct. at 1421.

Finally, as LaFave points out, the *Dalia* holding – that a wiretap warrant did not specifically have to authorize covert entry to install such a device – was grounded in two considerations: "(i) such entry is necessary for virtually every wiretap, so specific authorization would be an 'empty formalism'; and (ii) covert entry does not involve destruction of property or

### 5. The Court Properly Required A Showing Of Specific Evidence Of Danger To The Officers.

The government argues that it is unreasonable to demand specific information as to dangerousness because such evidence is "ordinarily unavailable" to officers. Gov. Br. 21. This argument is wrong for two reasons. First, the "demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence." *Terry*, 392 U.S. at 21 n.18.[36]

Second, the long history of government success in the Ninth Circuit under the approach that it now attacks belies the assertion that specific inferences of danger are ordinarily unavailable to the officers. The Ninth Circuit's cases are rife with instances of the availability of such inferences to the police.[37] Similarly, the failure of the government to complain

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danger to persons." LaFave, *supra*, at 626. Neither reason is applicable here. On the contrary, we deal here not with the covert entry into an uninhabited office building, but with the overt, forcible breaking into an occupied family residence at night.

[36] In justifying the particular intrusion, the police officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion." *Terry*, 392 U.S. at 21; *see Maryland v. Buie*, 494 U.S. 325, 334, 336-37 (1990) (specific and articulable facts must be shown to authorize protective sweep of a home); *People v. Gastelo*, 432 P.2d 706, 708 (Cal. 1967) (*en banc*) ("just as the police must have sufficiently particular reason to enter at all, so must they have some particular reason to enter in the manner chosen").

[37] *See, e.g., United States v. Hudson*, 100 F.3d 1409, 1417 (1996) (defendant recently sold drugs to informant, had prior conviction for drugs and observed with guns and drugs in bedroom), *cert. denied*, 1997 WL 593044 (Oct. 20, 1997); *United States v. Scott*, 74 F.3d 175, 176 (9th Cir.) (defendant observed with weapon in his hand), *cert. denied*, 117 S. Ct. 131 (1996); *United States v. Perez*, 67 F.3d 1371, 1384 (9th Cir. 1995) (defendant "had shot and killed a suspected informant" and said he would "go down shooting"); *United States v. Von Willie*, 59 F.3d 922, 926 n.3 (9th Cir. 1995) (defendant armed and dangerous); *United States v. Reed*, 15 F.3d 928, 934 (9th Cir. 1994) (officer knew defendant likely armed and might



either to this Court or the court of appeals – over the last twenty-five years since the Ninth Circuit's approach was first announced – renders hollow the government's claim that specific inferences of danger are not ordinarily available.

### 6. The Approach Of The Ninth Circuit Does Not Increase The Risk Of Harm To The Police Or Unduly Burden Law Enforcement.

The government argues that the Ninth Circuit's approach is disruptive of law enforcement and "increases the risk of harm faced by officers executing warrants." Gov. Br. 20. *Amicus* AELE asserts that service of warrants "ranks among the most dangerous activity in which officers can engage" and makes the dire prediction that affirmance of the approach adopted below will "cost the lives of many police officers in the future." *Amicus* AELE Br. 7-8. The government and *amicus* offer no statistical studies whatever to support their conclusions. In fact, *Amicus* Ohio concedes that "statistics do not reveal the numbers of officers assaulted during the execution of warrants, let alone . . . in the context of the pursuit of an escaped felon." *Amicus* Ohio Br. 10. Moreover, as shown above, the exact opposite is true.

Further, the dire predictions of the government and *Amicus* are refuted by the government's unquestioned reliance upon the rule to argue that no-knock entries should be upheld, and, as the government concedes, it has "generally prevailed" under the standard. Gov. Cert. Reply Br. 2 n.1. The cases bear out this conclusion. Even in the case at bar, at the district

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escape and slammed door in officer's face); *United States v. Turner*, 926 F.2d 883, 885 (9th Cir.) (defendant overheard to say he kept gun for use against police), *cert. denied*, 502 U.S. 830 (1991); *United States v. Ramirez*, 770 F.2d 1458, 1461 (9th Cir. 1985) (police knew that suspects in a kidnaping and murder investigation were armed and dangerous); *United States v. McShane*, 462 F.2d 5, 6 (9th Cir. 1972) (defendant armed and previously convicted of shooting at an officer); *Gilbert v. United States*, 366 F.2d 923, 929, 931 (9th Cir. 1966) (defendant armed and alleged to have killed police officer), *cert. denied*, 388 U.S. 922 (1967).

court hearing on the motion to suppress, the government praised *Becker* (which restates the Ninth Circuit approach) as *"very useful for the court . . . in stating the standard which in this case must be specific inferences of exigency to justify the breaking."* *See* Lodged Doc. B (Tr. Oral Arg. April 25, 1995 at 21). In fact, the government did not even complain about the Circuit's approach until its petition for rehearing *en banc* – after it lost the case. *See* Lodged Doc. E at 7 (Petition for Rehearing).

### 7. Breaking And Gunporting The Window Is Not *"De Minimis."*

The government dismisses the broken window pane and the thrusting of a firearm inside it as *"de minimis."* Gov. Br. 11, 29. In one sense, of course, it is. The replacement value of the pane cannot be much. But the government and *Amicus* miss the larger points. The breaking of the pane, together with the gunporting of the window, constituted an invasion of the sanctity and privacy of the home.[38] In this sense there can be no *de minimis* violation. For example, in *Arizona v. Hicks*, 480 U.S. 321 (1987), an officer who was lawfully inside a house was looking for stolen property and moved stereo equipment just "a few inches" to see the serial number. The state apparently argued that the movement did not constitute a search because it was trivial. This Court rejected that argument, noting that moving the object even a few inches was "much more than trivial for purposes of the Fourth Amendment." *Id.* at 325.[39]

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[38] *See Richards*, 117 S. Ct. at 1421 n.4 (Fourth Amendment "preserve[s] that degree of respect for the privacy of persons and the inviolability of their property that existed when the provision was adopted") (quoting *Dickerson*, 508 U.S. at 380 (Scalia, J., concurring)); *Welsh v. Wisconsin*, 466 U.S. at 748 ("it is axiomatic that the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed").

[39] *See also United States v. Karo*, 468 U.S. 705, 717 (1984) (rejecting argument that monitoring of beeper inside house is a "minuscule intrusion



Furthermore, as the instant case illustrates, the shattering of glass at night is precisely the kind of property damage that will arouse terror in sleeping residents. It was wholly foreseeable that the officers' actions here would cause Mr. Ramirez to act in defense of himself, his wife, and his three-year-old child. As Justice Harlan observed, "it is difficult to imagine a more severe invasion of privacy than the nighttime intrusion into a private home that occurred in this instance." *Jones v. United States*, 357 U.S. 493, 498 (1958) (concurring opinion); *cf.* Klaus P. Fischer, *Nazi Germany, A New History*, 392 (Continuum Press 1995) (discussing "*Kristallnacht,*" November 9, 1939, known as "The Night of the Broken Glass"); William L. Shirer, *The Rise and Fall of the Third Reich*, 430-32 (Touchstone ed. 1981) (same). The shattering of glass of the Ramirez family residence and the thrusting of the firearm inside are not *"de minimis."*

## B. Even If The Courts Below Wrongly Considered Property Damage, Their Result Should Be Affirmed Because There Was Insufficient Evidence That Shelby Was On The Premises Or That He Posed An Imminent Threat To The Forty-Five Armed Agents.

The reasonableness of the officer's decision to make an unannounced entry "must be evaluated as of the time they entered [the residence]." *Richards*, 117 S. Ct. at 1422. Because of the obvious danger to the officers and occupants, before breaking into the Ramirez residence, the officers should believe more than that Shelby was "probably" in the residence. At the very least, they should have "strong reason" to believe that he was there. *See Brown*, 52 F.3d at 421; *Dorman*, 435 F.2d at 393; *cf. Maden*, 64 F.3d at 1509 (officers

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on protected privacy interests"); *cf. Boyd v. United States*, 116 U.S. 616, 635 (1886) ("it may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure").

"knew" that defendant, a wanted fugitive, was in the apartment).

This "strong reason" was lacking. Indeed, the court of appeals had "some doubt" even as to whether Shelby was "probably" on the premises. Pet. App 12a, n.1. At the time of the entry here, as noted by the court of appeals, the officers had received no "confirmation that Shelby was on the premises." Pet. App. 10a. The "most that was known" was that he was there two or three days before the warrant was executed. Pet. App. 12a, n.1. Moreover, the last time Shelby had been "seen" was from a distance of 1,000 yards on November 3, 1995. By November 5, 1995, if Shelby had ever been there, he was likely long gone. After all, "fugitives from justice tend to be mobile" and do not remain long at one place. *Steagald*, 451 U.S. at 224 (Rehnquist, J., dissenting). Given the uncertainty of Shelby's presence, and given the obvious dangers associated with forcing entry at night by shattering glass, the officers acted unreasonably in not complying with the knock-and-announce rule.

Furthermore, even had Shelby been on the property, he would have presented little realistic threat of danger to a force of forty-five armed officers where there was no specific evidence he was armed or intent upon shooting law enforcement agents. To be sure, Shelby had a violent past, had made threats, and had several escapes. Nevertheless, the force of forty-five armed SWAT team members was more than ample to cope with any potential resistance from Shelby or any attempted escape.

The lower courts found inadequate suspicion that Shelby was *presently* armed and intended to shoot at the officers if they announced their presence.[40] The district court made a

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[40] *See Poole v. United States*, 630 A.2d 1109, 1118 (D.C. App. 1993) (police must have reason to believe "there was a realistic possibility" that the occupant "would use the weapons against them"), *cert. denied*, 513 U.S. 855 (1994); *People v. Krueger*, 675 N.E.2d 604, 609 (Ill.1996) (officers must have "reasonable belief that a weapon will be used against them if they proceed with the ordinary announcements"), *cert. denied*, 118 S. Ct. 49 (1997); *State v. Jeter*, 634 P.2d 312, 314 (Wash. App. 1981) ("a concern for police safety must be based upon prior knowledge or direct observation that the subject of the search keeps weapons *and* that such person has a known propensity to use them"); *People v. Bennetto*, 517 P.2d 1163, 1167 (Cal. 1974) (*en banc*) (police "must reasonably believe weapon will be used against them . . . [t]his belief must be based on specific facts and not on broad, unsupported presumptions.")



specific finding on this matter: the officers had "*no information that [Shelby] was armed and dangerous at defendant's home, or that he would present any specific dangers to arresting officers if found there.*" Pet. App. 34a (emphasis added). As the Court has recently stated, "a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn therefrom by resident judges, who view such facts in light of the community's distinctive features and events. . . . " *Ornelas v. United States*, 116 S. Ct. 1657, 1663 (1996). Under this stringent standard, "if the district court's account of the evidence is plausible in light of the record viewed in its entirety, the [reviewing court] may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564, 573-74 (1985).

In any event, the district court's finding is fully supported by the record. As both the district court and the court of appeals have noted, there is no evidence that Shelby had ever shot or threatened to shoot in the past, much less a police officer. The informant who supposedly saw Shelby on the property did not say that Shelby was armed or that he had threatened to shoot anyone. Nor did he say that he ever saw a gun on the property. He said that Ramirez was "supposed" to have a gun in the garage, but he provided no basis for this supposition.[41] Shelby did say in the past that he would "not

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[41] *Cf. United States v. Stowe*, 100 F.3d 494, 499 (7th Cir. 1996) (no-knock entry lawful where informant "had personally observed the defendant at the apartment with a large amount of crack cocaine and loaded firearms"), *cert. denied*, 117 S. Ct. 1438 (1997). The case at bar sharply contrasts with *Mahomed v. The Queen*, 4 Moore 239, 247, 13 Eng.Rep.

do federal time," but this statement hardly means that he was prepared to engage in a suicidal shoot out with a small army of police.

### C. The Needless Destruction Of Property Constituted A Violation Of Section 3109 And The Fourth Amendment.

The government concedes that "excessive or wholly unnecessary" destruction of property "may violate the Fourth Amendment's reasonableness standard, whether or not officers knock and announce before entry." Gov. Br. 23-24. The government's concession seriously undermines its position because, as observed by the court of appeals, Mr. Ramirez's property *was* "needlessly" damaged. Pet. App. 8a.

The government asserts that the breaking and gunporting of the garage window constituted a reasonable way "both to obtain entry and to draw the occupants to a position away from the doors," thus facilitating the officers' ability to control the search scene. Gov. Br. 26. This assertion makes no sense. By breaking the garage window, the officers would have diverted Shelby (as they did Ramirez) *to the garage*, the very place where guns were supposed to be. Moreover, in the court of appeals, the government implied the officers acted wisely in breaking the window because they were preventing the occupants from gaining access to the firearms in the garage. Lodged Doc. C at 7, Doc. D at 1-2. The government's contradictory arguments highlight the sheer speculation and Monday-night quarterbacking in which the government now engages to justify the officers' actions.[42]

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293, 296 (P.C. 1843) ("[w]hile he was firing pistols at them, were they to knock at the door, and to ask him to be pleased to open it for them?").

[42] The justification of surprise is not even present here because, rather than allowing immediate control, the breaking glass alerted the sleeping residents that an invasion was afoot.



## II. THE RESULT BELOW SHOULD BE AFFIRMED ON THE GROUND THAT THE KNOCK-AND-ANNOUNCE REQUIREMENT CONTAINED IN SECTION 3109 IS MORE RESTRICTIVE THAN THAT EMBODIED IN THE FOURTH AMENDMENT.

Section 3109 imposes a stricter standard than does the Fourth Amendment because the latter is governed only by the "flexible requirement of reasonableness." *Wilson*, 514 U.S. at 934. The requirements of Section 3109, by contrast, are "unqualified," *Miller*, 357 U.S. at 309, and "should not be given a grudging application." *Sabbath*, 391 U.S. at 589.[43]

### A. Section 3109 Contains No Exception For Officer Safety.

This Court implied in dictum that Section 3109 may contain an officer safety exception, but it has never so held.[44] To be sure, every Circuit court that has reached the issue has held that such an exception exists.[45] None of these cases is correctly reasoned, however, because none has undertaken the appropriate statutory and historical analysis set forth below.

#### 1. Section 3109 Explicitly Sets Forth Several Exceptions, But None For Officer Safety.

In Section 3109, Congress provided that, in executing a search warrant at a residence, an officer may force entry by breaking open a door or window in only three limited circumstances: (1) if, after notice of his authority and purpose, he is

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[43] The result below may be affirmed on any ground which the law and the record permit. *See Schenck v. Pro-Choice Network of Western New York*, 117 S. Ct. 855, 870 n.12 (1997) (citing cases); *Smith v. Phillips*, 455 U.S. 209, 215 n.6 (1982).

[44] *See supra*, n.7.

[45] *See, e.g., Gilbert v. United States*, 366 F.2d 923, 931 (9th Cir. 1966), *cert. denied*, 388 U.S. 92 (1967); *United States v. Kane*, 637 F.2d 974, 978 (3rd Cir. 1981).

refused admittance; (2) when necessary to liberate himself; or (3) when necessary to liberate a person aiding him in the execution of the warrant.[46] Conspicuously absent is any exception for officer safety. From this absence, it is reasonable to infer that Congress intended no such exception. The Court has explained:

> As in all cases involving statutory construction, our starting point must be the language employed by Congress, and we assume that the legislative purpose is expressed by the ordinary meaning of the words used. Thus, absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.

*American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (citations and quotations omitted); *accord United States v. James*, 478 U.S. 597, 604 (1986); *United States v. Ron Pair Enterprises*, 489 U.S. 235, 242 (1989).

The language of Section 3109 is clear. The enumerated exceptions do not include apprehension of danger to the officers. Had Congress intended to create such an exception, it would have said so. *See United States v. Sims*, 231 F. Supp.

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[46] The statute was originally enacted in two paragraphs as part of the Espionage Act of 1917, tit. XI, ch. 30 § 8-9, 40 Stat. 217, 228-29. The statute originally read as follows:

> § 8 The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute the warrant, if, after notice of his authority and purpose, he is refused admittance. § 9 He may break open any outer or inner door or window of a house, for the purpose of liberating a person who, having entered to aid him in the execution of the warrant, is detained therein, or when necessary for his own liberation.

In 1948 the two sections were condensed into the current 18 U.S.C. § 3109. Act of June 25, 1948, ch. 645, P.L. No. 772, 1948 U.S.C. Cong. Serv. (62 Stat. 820) 695.



251, 256-58 (D. Md. 1964) (holding that Section 3109 contains no exception for officer safety). The omission of an exception for officer safety reflects Congressional intent.[47]

**2. The Legislative History Of Section 3109 Supports The Conclusion That No Officer-Safety Exception Exists.**

Where, as here, the words of the statute are clear, the Court does not look to legislative history. *See Darby v. Cisneros*, 509 U.S. 137, 147 (1993) ("recourse to the legislative history . . . is unnecessary in light of the plain meaning of the statutory text"). Nevertheless, that history supports the conclusion that Section 3109 authorizes no exception for officer safety.

In the Conference Report accompanying the Espionage Act of 1917, the conferees stated that Title XI of the Act, which governs search warrants, "was based upon the New York law on this subject, and follows generally the policy of that law." Conference Report No. 65 at 20 (1917), accompanying H.R. 291, 65th Cong. 1st Sess. (1917). Apparently, in 1917, New York law contained no exception to the knock-and-announce requirement for officer safety.[48] New York

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[47] *See Tennessee Valley Authority v. Hill*, 437 U.S. 153, 188 (1978) ("In fact, there are no exemptions in the Endangered Species Act for federal agencies, meaning that under the maxim *expressio unius est exclusio alterius*, we must presume that these were the only 'hardship cases' Congress intended to exempt"); *cf. Lindh v. Murphy*, 117 S. Ct. 2059, 2063 (1997) (because Congress expressly made Chapter 154, pertaining to capital cases applicable to pending cases, but did not make the same express provision in regards to Chapter 153, the implication is that Congress did not intend Chapter 153 to apply to pending cases).

[48] *See Phelps v. McAdoo* 94 N.Y.S. 265, 266, 47 Misc. 524, 16 N.Y. Ann. Cas. 470, 19 N.Y.Cr.R. 126 (1905) ("the law does not even permit a police officer to break into a place under a search warrant unless 'after notice of his authority and purpose he be refused admittance' (Code Cr. Proc. § 799), and it is made a criminal offense for him to do so (Penal Code, § 120)"); *cf. Bell v. Clapp*, 10 Johns R. 263, 265 (N.Y. Sup. Ct. 1813)

Criminal Code Section 799 was enacted by the Law of 1881 c.442 as part of the Field Code. The statute reads as follows:

> The officer may break open an outer or inner door or window of a building, or any part of the building, or any thing therein, to execute the warrant, if, after notice of his authority and purpose, he be refused admittance.

*See* N.Y. Code Crim. Proc. § 799 (McKinney 1938). It was only in 1964 that New York amended the statute to add a provision authorizing a magistrate to issue a no-knock warrant.[49] Because 18 U.S.C. § 3109 was based on New York law as of 1917, Section 3109 contains no exception for officer safety.

### 3. Congress Has Enacted And Repealed A "No-Knock" Law, Showing That, Had Congress Wanted To Legislate An Exception For Officer Safety, It Knew How To Do So.

The enactment of the no-knock law of 1970, short-lived as it was, makes clear that Congress knows how to legislate exceptions to the knock-and-announce principle when it wants to. The enactment and repeal of the legislation strengthens the conclusion that Section 3109 contains no exception for danger to the officer. *See Gozlon-Peretz v.*

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(proper to break open door when executing search warrant where plaintiff demanded entry in "peaceable manner" and was refused). In the early 1780's, New York passed laws that authorized constables to break open the door of private homes in search of contraband alcohol, but only "if admittance shall be refused." N.Y. St. Sess.5, ch.39 s.3 (April 13, 1782), N.Y. State Laws, vol. 1 (1777-84), p. 480.

[49] *See* N.Y. Code Crim. Proc. § 799(b) (enacted by 1964 N.Y. Laws C. 85); *People v. DeLago*, 16 N.Y.2d 289 (1965) (upholding validity of the amendment), *cert. denied*, 383 U.S. 963 (1966).



*United States*, 498 U.S. 395, 406 (1991) (subsequent legislation has persuasive value regarding intent of earlier Congress) (quoting *Bell v. New Jersey*, 461 U.S. 773, 784 (1983)).[50]

### 4. The Common Law At The Time Of The Framing, Which The Statute Incorporates, Contained No Exception For Officer Safety.

The Court has suggested that Section 3109 incorporates the common law's knock-and-announce principle as well as its common law exceptions at the time of the framing of the Fourth Amendment.[51] If so, the conclusion that Section 3109 contains no exception for officer safety is strengthened, because at the time of the framing, the common law provided no such exception.

There are no indications that, before 1800, English common law "ever evolved an exception to the knock-and-announce rule based upon a reasonable apprehension of peril by the peace officer."[52] Indeed, "efforts to legislate a no-knock authorization were repeatedly resisted in the Eighteenth Century." Note, *Announcement in Police Entries*, 80 Yale L.J. 139, 144 (1970).

In this country, the knock-and-announce principle was "woven quickly into the fabric of Early American law."

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[50] In Conference Report No. 93-1442 (1974), 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 5974, 5976, the conferees address the intent of the repealing legislation, but, apparently, only insofar as the District of Columbia. The conferrees intended that repeal return the law to that which existed before no-knock was enacted and that officers in the District follow the law applicable to other federal officers.

[51] *See Sabbath*, 391 U.S. at 591 n.8; *Wilson*, 514 U.S. 927, 930, 934-35 and n.3 (interpreting scope of knock-and-announce principle at common law "at the time of the framing").

[52] Kemal Mericli, *The Apprehension of Peril Exception to the Knock and Announce Rule – Part I*, 16 *Search And Seizure Law Report* (July 1989) at p. 132; *Ker*, 374 U.S. at 54 (Brennan J., dissenting) ("I have found no English decision [before the framing] which clearly recognizes any exception to the requirement. . . . ").

*Wilson*, 514 U.S. at 933.[53] Tellingly, "[e]very legal manual for American justices of the peace between 1788 and 1791 forbade unannounced, forcible entry to accomplish an arrest." W. Cuddihy, *The Fourth Amendment: Origins and Original Meaning* (1990) at 1511 (unpublished Ph.D. dissertation, at Claremont Graduate School).[54] Furthermore, there are "no reported cases in America before 1791 discussing any exigent circumstances exception to announcement."[55]

The first time a danger-to-the-officer exception was recognized in England or America was in *Read v. Case*, 4 Conn. 166, 170 (1822). There, the court held that a plaintiff who "had resolved . . . to resist even to the shedding of blood . . . was not within the reason and spirit of the rule requiring notice." *Id.* At the time of the framing, therefore, about thirty years before *Read* was decided, the common law did not recognize an officer-safety exception to the knock-

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[53] The Court has noted that in England there was some question as to whether the knock- and-announce principle itself was ever extended to felony arrests. *See Richards*, 514 U.S. at 935 (not "conclusive"). The Court pointed out, however, that according to the leading common law commentators, Hawkins and Hale, there was no question that the principle extended to felony arrests. *Id.* at 932; *see* Note, *No-Knock and the Constitution*, 55 Minn. Law. Rev. 871, 876 (1971) ("exceptions to the *Semayne* rule of announcement were not recognized by early English text writers").

[54] Justice O'Connor has described Cuddihy's dissertation as "one of the most exhaustive analyses of the original meaning of the Fourth Amendment ever undertaken." *Vernonia School District 47J v. Acton*, 115 S. Ct. 2386, 2398 (1995) (dissenting opinion); *see also* Morgan Cloud, *Searching Through History; Searching For History*, 63 U. Chi. L. Rev. 1707, 1710, 1746 (Fall 1996) (the dissertation is "the most ambitious history of the Fourth Amendment's origins yet undertaken by a professional historian" and it "serves as a model of the effort and objectivity that are hallmarks of legal history").

[55] Robert Driscoll, *Unannounced Police Entries and Destruction of Evidence After Wilson v. Arkansas*, 29 Colum. J.L. & Soc. Probs.1, 26 (Fall 1995); Note, *Announcement in Police Entries*, 80 Yale L.J. 139, 144 (1970).



and-announce principle. Therefore, Section 3109 contains no such exception.

### 5. Congress Determined That Strict Compliance With The Statute Best Promotes The Safety Of The Officers And The Occupants.

Although Congress did not enact an exception for officer safety, by enacting the statute as it is, Congress *did* provide for officer safety. Recognizing that deaths to officers and occupants can occur whether or not there is an announcement of identity and purpose, Congress balanced the various risks, considered the experience of the common law, and determined that compliance with Section 3109 best protects the safety of the occupants and officers alike. This judgment is entirely reasonable. The common law and this Court have always insisted that compliance with the knock-and-announce rule safeguards the police as much as the occupants of the residence. *Supra*, at 19-22.

### 6. The Circuit Courts Have Erroneously Rewritten The Statute.

The circuit courts erred in creating an officer-safety exception because they did not undertake the analysis set forth in Sections 1-5 above. By judicially creating an officer-safety exception, the circuit courts have rewritten the statute as they deem it "should" read. Courts, however, "are not authorized to rewrite a statute because they might deem its effects susceptible of improvement." *Badaracco v. Commissioner of Internal Revenue*, 464 U.S. 386, 398 (1984). Nor may a court interpret a statute "to reach what [the court] perceive[s] – or even what [the court] thinks a reasonable person should perceive – is a 'sensible result.'" *Bifulco v. United States*, 447 U.S. 381, 401 (1980) (Burger, C.J., concurring). Rather, "[c]ourts must presume that a legislature says in a statute what it means and means in a statute what it says." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Therefore, "Congress must be taken at its word unless [the Court is] to assume the role of statute

revisers." *Bifulco*, 447 U.S. at 401.[56] In sum, Section 3109 contains no exception for danger to the officer.

### B. Even If Section 3109 Contains An Exception For Officer Safety, The Exception Should Only Apply When The Officers Have A Reasonable Belief That Compliance With The Knock-And-Announce Rule Presents An "Imminent" Danger To Their Safety

Even if Section 3109 contains an exception for officer safety, the Court should construe the exception more restrictively than that embodied in the Fourth Amendment.[57] The Court should adopt the "imminent peril of bodily harm" standard to which the FBI adheres.[58] This standard was

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[56] *See also Tennessee Valley*, 437 U.S. at 194 (where "Congress has spoken in the plainest of words . . . our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by Congress is to be put aside"); *Morse v. Republican Party of Virginia*, 116 S. Ct. 1186, 1234 n.18 (1996) (Thomas J., dissenting) ("we are not free to construe statutes by wondering about what Congress 'would have wanted to enact' . . . [w]e must look to the exact text of the statute and see what Congress has in fact, and not in theory, enacted").

[57] *See United States v. Moore*, 956 F.2d 843, 847 (8th Cir. 1992) (Section 3109 described as "more restrictive than the Fourth Amendment"); *United States v. Stiver*, 9 F.3d 298, 301-02 (3rd Cir. 1993) ("some conduct authorized by Section 3109 may nonetheless violate the Constitution; conversely, some conduct permissible under the Constitution may be barred by Section 3109."), *cert. denied*, 114 S. Ct. 1115 (1994); *United States v. Sagaribay*, 982 F.2d 906, 910 (5th Cir.) (although search by state officers under state warrant may have violated Section 3109, search was reasonable under Fourth Amendment), *cert. denied*, 114 S. Ct. 160 (1993). Under Section 3109 the government bears the burden of establishing that the officer's unannounced entry falls within an exception to the knock-and-announce rule. *Maden*, 64 F.3d at 1505; *United States v. Phelps*, 490 F.2d 644, 645 (9th Cir. 1974), *cert. denied*, 419 U.S. 836 (1976).

[58] According to the *amicus* brief filed by the United States on behalf of the respondent in *Richards*, federal agents "virtually always" announce



enunciated in *Read v. Case*, 4 Conn. at 170, the first case to establish the officer safety exception at common law.[59] Under this standard, the result below should be affirmed: for the reasons set forth above, Shelby did not pose an imminent peril to the officers.

## III. THE RESULT BELOW SHOULD BE AFFIRMED BECAUSE THE MAGISTRATE HAD NO AUTHORITY TO ISSUE A NO-KNOCK WARRANT, AND, THEREFORE, THE WARRANT WAS VOID *AB INITIO*

As shown above, in 1970, Congress authorized magistrates and judges to issue no-knock warrants in limited circumstances, but Congress repealed this authority in 1974. Therefore, when the Magistrate-Judge issued a no-knock warrant in the instant case, he had no authority to do so. As a consequence, the warrant was void *ab initio*. *Cf. Gomez v. United States*, 490 U.S. 858, 872-76 (1989) (where Congress did not authorize magistrates to select jury over objection, conviction void regardless of lack of prejudice); *Bingman v. Ward*, 100 F.3d 653, 658 (9th Cir. 1996) (because magistrate

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their presence and purpose when executing a search warrant. Gov. *Amicus* Br. (*Richards*) 29 n.3, 1997 WL 106423. The FBI does not comply with the rule only in those cases where the officer reasonably believes that the announcement would place himself or other persons within the premises "in imminent peril of bodily harm." *Id.* (citing FBI Legal Handbook for Special Agents Sec. 5-2.2.2, 5-2.2.3(1) (1994)).

[59] *See United States v. Rivera*, 928 F.2d 592, 606 (2d Cir. 1991) (no-knock entry proper only if "imminent danger" of bodily harm to persons inside); *State v. Stevens*, 511 N.W. 2d 591, 600 n.1 (Wis. 1994) (Abrahamson, J., concurring) (no-knock proper if "imminent danger" to officer), *cert. denied*, 515 U.S. 1102 (1995); *cf. Ker*, 374 U.S. at 47 (Brennan, J., dissenting) (one exception to knock-and-announce rule exists when persons within residence are in "imminent peril of bodily harm."); *see also* Goddard, *supra*, 75 B.U.L.Rev. at 460 (discussing "imminent danger" standard).

may not "undertake the exercise of an authority which Congress has expressly withheld," contempt order vacated), *cert. denied*, 117 S. Ct. 1473 (1997).[60]

## CONCLUSION

The danger to the officers in the instant case arose not from Shelby, who was not on the premises, but rather from the officers' unreasonable failure to comply with the simple and ancient requirement that the officers "ought to signify the cause of their coming, and to make request to open doors." The Court should affirm the result below.

RESPECTFULLY SUBMITTED November, 1997.

/s/ Michael R. Levine
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*Attorney for Respondent*

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[60] Mr. Ramirez raised this argument in the district court, but the court did not address it. *See* Motion to Suppress, Dist. Ct. Docket No. 20, filed with this Court on November 5, 1997, styled "Lodged Document I in Support of Respondent's Brief on Writ of Certiorari." In the court of appeals, the government argued that the "no-knock" clause in the warrant supported the conclusion that the executing officers relied in good faith on the warrant. *See* Lodged Doc. C at 13. In his brief, Mr. Ramirez answered that the officers were not acting in good faith because they persuaded the magistrate to undertake an unlawful act: namely, issuing an unauthorized "no-knock" warrant. *See* Ramirez Brief on Appeal to the Ninth Circuit Court of Appeals at 8-9, lodged with the Court on November 5, 1997, styled "Lodged Document J in Support of Respondent's Brief on Writ of Certiorari." Mr. Ramirez did not, however, raise the instant argument as a separate ground for affirmance of the judgment.

Supreme Court, U.S.
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No. 96-1469

# In the Supreme Court of the United States

OCTOBER TERM, 1997

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UNITED STATES OF AMERICA, PETITIONER

*v.*

HERNAN RAMIREZ

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*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE NINTH CIRCUIT*

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## REPLY BRIEF FOR THE UNITED STATES

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# In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 96-1469

UNITED STATES OF AMERICA, PETITIONER

*v.*

HERNAN RAMIREZ

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## REPLY BRIEF FOR THE UNITED STATES

Respondent does not directly defend the court of appeals' holding that a two-tier analysis governs the permissibility of no-knock entries, under which a heightened showing is needed to sustain the entry if the police damage property. Instead, his principal submission is that the inquiry into whether an unannounced entry is lawful under the Fourth Amendment depends on a totality-of-the-circumstances test; he then suggests that damage to property is one factor in the analysis and that such damage imposes a greater burden on officers to justify the entry. Resp. Br. 13-14, 30. Aside from being a different analysis than that embraced by the Ninth Circuit, respondent's position independently lacks merit. Absent from respondent's argument is an adequate justification for why, when officers have "a reasonable suspi-

cion" (*Richards* v. *Wisconsin*, 117 S. Ct. 1416, 1418 (1997)) that an announcement before entry would be dangerous, the officers' decision to make a no-knock entry may be found invalid based on circumstances that develop later. In fact, neither the Ninth Circuit's two-tier test nor respondent's approach can be derived from the Fourth Amendment or from the statutory codification of common-law knock-and-announce principles in 18 U.S.C. 3109.

1. a. Respondent's defense of the judgment below begins with an assertion (Br. 14) that *Richards'* articulation of a reasonable suspicion standard is "dictum." In *Richards*, this Court adopted the requirement that, before officers may make an unannounced entry, they must have reasonable suspicion to believe that they face an increased risk of danger, destruction of evidence, or the flight of a fugitive. 117 S. Ct. at 1421-1422. That requirement constitutes a holding, not "dictum." In *Richards*, the Court rejected the state court's view that there is a blanket exception to the knock-and-announce requirement for felony drug searches, and instead ruled that an unannounced entry must be justified on the facts of a particular case by "reasonable suspicion." *Id.* at 1421. The Court then affirmed the judgment by applying that standard: "Although we reject the Wisconsin court's blanket exception to the knock-and-announce requirement, we conclude that the officers' no-knock entry into Richards' hotel room did not violate the Fourth Amendment. We agree with the trial court, and with Justice Abrahamson, that the circumstances in this case show that the officers had a reasonable suspicion that Richards might destroy evidence if given further opportunity to do so." *Id.* at 1422. The Court's application of a "reasonable suspicion"



standard in upholding the judgment cannot properly be characterized as "dictum." See, *e.g.*, *Seminole Tribe of Florida* v. *Florida*, 116 S. Ct. 1114, 1129 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound."). And the Ninth Circuit's two-tier approach to unannounced entries cannot be reconciled with the single "reasonable suspicion" standard articulated in this Court's unanimous decision in *Richards*.[1]

b. Respondent contends (Br. 18) that, because one purpose of the knock-and-announce rule "is the prevention of damage to property, it makes no sense" to bar courts from considering property damage "under

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[1] The "reasonable suspicion" standard adopted in *Richards* was modeled on the similar standard required by this Court to justify pat-down searches and protective sweeps. See *Richards*, 117 S. Ct. at 1422 (citing *Terry* v. *Ohio*, 392 U.S. 1 (1968); *Maryland* v. *Buie*, 494 U.S. 325 (1990)). In neither area has the Court required heightened justification if property is damaged during the intrusion. Respondent disputes the validity of our analogies to a pat-down search or a protective sweep of a home, because neither is "governed by the requirements of the knock-and-announce principle, one of whose fundamental purposes is the protection of the individual's home against invasion and damage." Resp. Br. 29. But protective sweeps directly intrude on the privacy of a home, and stop-and-frisk encounters intrude on the equally fundamental security of a person. This Court's cases permitting such intrusions based on a reasonable suspicion do not imply that the level of justification required of officers is raised if property is damaged during the intrusion. Indeed, the safe accomplishment of a *Terry* frisk or protective sweep may require some damage to property, but there is still no requirement that the officers must make a higher showing of danger. Similarly, a no-knock entry does not require officers to make an additional showing of danger when the entry involves some damage to property.

the totality of circumstances surrounding the entry." That objection misunderstands the nature of the reasonable suspicion inquiry courts must make. As this Court explained in *Ornelas* v. *United States*, 116 S. Ct. 1657, 1661-1662 (1996) (emphasis added), "[t]he principal components of a determination of reasonable suspicion or probable cause will be the events which occurred *leading up to the stop or search*, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause." That assessment properly involves consideration of events that *precede* the decision to undertake the search or seizure requiring reasonable suspicion, but does not encompass events that occur afterward—events that by definition cannot be known by the officers when they embark on the action in question.[2]

Respondent suggests (Br. 18) that the existence or degree of property damage is relevant in evaluating

[2] The proper inquiry also does not encompass the variable of how many officers are involved in the particular operation—a factor on which respondent would make the constitutional rule of reasonableness turn. See Resp. Br. 38 (the more officers on the scene, the less reasonable their fear of danger). The constitutionality of a particular intrusion should not depend on how a particular operation is staffed; it should be based on whether the officers have the requisite reasonable suspicion that the occupant will commit violent acts against them, destroy evidence, or flee. Indeed, the use of a large force of officers may simply corroborate and reflect the officers' reasonable belief that a suspect poses a particular danger of violence or flight. But the use of such a force should not be turned against the officers to deprive them of what would otherwise be a constitutionally reasonable means of reducing the risk that violence or flight might ensue.



the reasonableness of an unannounced entry because one of the values underlying the knock-and-announce rule is the prevention of damage to property. But the existence of that purpose behind the rule does not imply that property damage must be examined in each case as bearing on whether the entry was justified. A no-knock entry necessarily intrudes on values underlying the knock-and-announce rule. For that reason, this Court required, as a rule, that officers must be able to articulate a reasonable suspicion to justify it. The Court did not adopt a sliding scale that shifts depending on the intrusiveness of any particular entry. Thus, the fact that a particular unannounced entry may be destructive of property does not elevate the required showing to probable cause. And, by the same token, the fact that another no-knock entry may be accomplished peaceably and without any property damage does not permit the officers to justify it based merely on a subjective hunch. Cf. *Sabbath* v. *United States*, 391 U.S. 585, 589 (1968) (opening a closed but unlocked door still constitutes an unannounced intrusion under 18 U.S.C. 3109). Respondent's approach, in contrast, would require such a sliding scale. The effect would be to deprive officers of any assurance that the possession of reasonable suspicion will be sufficient to justify any particular entry.[3]

[3] It is possible that respondent's view is that the factor of property damage is the *only* consideration that may elevate the burden on officers to justify the entry, and that other actions that increase the intrusiveness of the entry have no similar consequence. If respondent intends to adopt that approach, however, it would inexplicably overvalue the property-protection rationale of the knock-and-announce rule as compared to the other interests promoted by the rule.

Respondent also asserts (Br. 19-21) that the safety of officers is particularly jeopardized when property is broken during an unannounced entry. From that proposition, he argues that, because one of the purposes of the knock-and-announce rule is to reduce the risk of violence to officers, an officer's need to damage property should increase the burden on him to justify the unannounced entry. There is no reason to believe, however, that law enforcement officers will engage in practices that exacerbate, rather than reduce, the dangers they face. If, as respondent asserts, a no-knock entry that results in damage to property necessarily increases the risk of harm to officers, the Fourth Amendment is not needed as a shield to protect citizens; officers' own prudence will regulate their willingness to employ the no-knock exception to the general principle of knock and announcement.

In any event, respondent's theory is not borne out by experience. First, the anecdotes recounted by respondent draw only an attenuated link between the breakage of property and the increased risk of danger. If those incidents properly may be generalized, it is the surprise encounter within a person's home (and not the damage to property) that triggers the danger in those circumstances. Such surprise, of course, can occur when officers make a no-knock entry without damaging property. Second, if the dangers of making no-knock entries over the past few decades had actually resulted in a large number of tragedies, those statistics would be available and would speak more powerfully than the isolated anecdotes recited by respondent.

Moreover, although the examples of dangerous circumstances cited throughout respondent's brief



have already been made known to this Court,[4] the Court nonetheless has recognized that the knock-and-announce rule gives way in appropriate circumstances. The issue here is whether the reasonable suspicion that justifies the departure from the knock-and-announce rule becomes insufficient when property is damaged. Respondent cannot carry the burden he sets for himself in contending that "property damage directly bears on the officers' interest in safety" (Resp. Br. 26), and there is no basis for requiring a higher showing than reasonable suspicion to justify a no-knock entry by officers when property is damaged.[5]

Ultimately, respondent cannot dispute that the property damage in this case is de minimis: "While the value of the glass was not great, it is the officers'

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[4] See Pet. Br. at 29-32, *Richards* v. *Wisconsin*, No. 96-5955; Reply Br. at 13-14, *Richards* v. *Wisconsin*, No. 96-5955; Brief for American Civil Liberties Union et al. as Amicus Curiae at 26-27, *Wilson* v. *Arkansas*, No. 94-5707.

[5] Respondent states that "[t]he government argues that it is unreasonable to demand specific information as to dangerousness because such evidence is 'ordinarily unavailable' to officers." Resp. Br. 34. That is not our contention. *Richards* makes clear that the officers must have reasonable suspicion to believe that knocking and announcing will result in heightened danger to the officers, destruction of evidence, or flight. Our objection is to the Ninth Circuit's two-tier approach, which requires officers to make a greater showing of danger to justify breaking property. Whatever *additional* information is needed to meet that standard may not be available to officers when they make the tactical decision to break a lock or a window to effectuate entry. And, given the likelihood that few no-knock entries can be made without at least some property damage, the Ninth Circuit's requirement of a heightened showing in such cases is likely to swallow the reasonable-suspicion rule.

invasion of the sanctity of the home that is not trivial." Resp. Br. 9; see also *id.* at 36.[6] That fact underscores that property damage cannot be the litmus test for requiring additional justifications of the officers' decision to make an unannounced entry. Had the officers here deployed their guns by opening an unlocked window in respondent's house—thus creating the same "invasion of the sanctity of the home"—the Ninth Circuit's two-tier rule would not have required a greater showing of danger to the officers. Respondent's acknowledgment that the breakage of the property here was modest highlights the arbitrariness of the court of appeals' rule in the practical circumstances faced by law enforcement officers, who should not have to risk their lives, the destruction of evidence, or flight on the fortuity of an unlocked door or window.

c. Respondent argues (Br. 40) that we concede that "needless" property damage may be unconstitutional, and since, in his view, breaking the garage window was "needless," the entry here was unconstitutional. See Resp. Br. 40-41. We do not concede that the property damage in this case was "needless." Rather, it served two functions. First, it provided a means for

[6] Respondent objects that the damage was not de minimis because "the shattering of glass at night is precisely the kind of property damage that will arouse terror in sleeping residents." Resp. Br. 37. Yet respondent does not and cannot dispute that it would equally "arouse terror" if an individual awoke to find himself confronted by officers who had surreptitiously entered his home. Moreover, respondent's suggestion that the entry occurred "at night" is inaccurate on the facts of this case. The warrant was served at 6:15 a.m., an hour within the definition of "daytime," for purposes of executing warrants. See Fed. R. Crim. P. 41(h).



the officers to secure the garage, where previous information had led them to believe respondent stored firearms. Respondent's contention that the breaking would have drawn respondent (or Shelby) to the garage is precisely the point. Unless the officers could secure the garage from the window, they would risk being fired upon inside the house if respondent (or Shelby) got to the guns first. Second, breaking the window served as a diversion to confuse the occupants, thereby creating a tactical advantage for the officers. Whether the occupants would have known that the sound of breaking glass was a garage window or some other window in the house is unknown. But that kind of diversion may assist officers in securing the premises by drawing persons out from behind closed doors and out of rooms to locations where they may be more easily detained. It is hardly the sort of grossly excessive or wanton destruction of property that might call into question an otherwise valid entry.

d. Finally, respondent contends (Br. 37-38) that the officers lacked probable cause to believe that Shelby was on the premises. Neither of the courts below based its decision on that argument,[7] instead holding that the officers lacked the additional justification necessary to effect a no-knock entry that damages property. In any event, the evidence was sufficient to justify a belief that Shelby was at respondent's house, *i.e.*, that there was probable cause for the warrant. See *Illinois* v. *Gates*, 462 U.S. 213, 236 (1983) (noting deference due to issuing magistrate's finding of probable cause).

[7] See Pet. App. 10a, 12a. Indeed, the district court specifically approved the finding of probable cause. See *id.* at 30a-31a.

The affidavit in support of the search warrant stated that a special agent of the Bureau of Alcohol, Tobacco, and Firearms (ATF) had received information from a "Confidential Reliable Informant" (CRI), a person who had "given very reliable information to the ATF in the past, including information that led to the arrest of a fugitive felon." Pet. App. 39a. The CRI related that he "had seen a person believed to be Alan Shelby" at the address where respondent lived. *Ibid.* The CRI "also overheard 'Alan' make a statement approximating the following: 'I had to knock out a guard.'" *Ibid.* The officers knew that, when Shelby escaped custody, he had "assaulted a Deputy Sheriff by knocking him down." *Id.* at 37a. When the CRI told the ATF agent that information, the CRI did not know that Shelby had recently escaped from custody. *Id.* at 39a. But when he learned from the media the next day of Shelby's escape, the CRI again contacted the ATF agent, who later that day also personally observed a man "very similar to the photograph of Alan Shelby" outside of respondent's residence. *Id.* at 39a-40a. The CRI confirmed that he had seen the same person there the previous day when he reported the information to the ATF agent. The Deputy U.S. Marshall who swore to the affidavit also went to the premises and "couldn't make a positive I.D. but * * * believe[d] it was the same person described by [the ATF agent]." *Ibid.* Based on those facts, the magistrate had ample probable cause to issue a search warrant for Alan Shelby at respondent's residence.

2. As an alternative ground for affirming the judgment below, respondent argues (Br. 10, 41-49) that the knock-and-announce requirement codified in 18 U.S.C. 3109 is more restrictive than the knock-and-announce rule incorporated in the Fourth Amend-



ment's requirement that searches and seizures be "reasonable." In particular, respondent contends (Br. 10) that "Section 3109 contains no exception for officer safety at all." Those claims are unfounded.

This Court has repeatedly suggested, and the courts of appeals have unanimously held, that Section 3109 codifies the common-law knock-and-announce rule and its exceptions. In *Miller* v. *United States*, 357 U.S. 301, 313 (1958), this Court described Section 3109 as "codifying a tradition embedded in Anglo-American law." Similarly, in *Sabbath*, the Court characterized Section 3109 as "a codification" of common-law principles and noted that there "is little reason why" the "limited exceptions" to the common-law announcement rule "might not also apply to § 3109." 391 U.S. at 591 n.8; see also *Wilson* v. *Arkansas*, 514 U.S. 927, 934 n.3 (1995) (describing *Sabbath* as "suggesting that both the 'common law' rule of announcement and entry and its 'exceptions' were codified in § 3109").[8] Guided by those statements, for decades the courts of appeals have construed Section 3109 as incorporating the common-law

[8] In addressing other aspects of Section 3109, this Court has also repeatedly rejected the sort of strictly literal reading of the statute that respondent advocates, in favor of construing Section 3109 to parallel Fourth Amendment principles. In *Miller*, for example, the Court held that Section 3109 applies to the execution of arrest warrants and to warrantless arrests, even though by its terms it applies only to the execution of search warrants. 357 U.S. at 309. Moreover, the Court applied an exclusionary rule remedy for a violation of the statute even though the statutory text does not require (or authorize) such a remedy. *Id.* at 313-314. And in *Sabbath*, the Court interpreted the statute's reference to "break[ing] open" a door as including the opening of a closed but unlocked door. 391 U.S. at 590.

exceptions to the knock-and-announce requirement in various "exigent circumstances," including imminent destruction of evidence, flight by a recently escaped fugitive, and threats to officer safety.[9]

Respondent contends that, because Section 3109 does not explicitly recognize a general officer-safety exception, it is improper for the courts to construe the statute as though Congress intended to incorporate one. This Court, however, has recognized that statutes that codify the common law should be read in light of the doctrinal principles they embody, cf. *Salinas* v. *United States*, No. 96-738 (Dec. 2, 1997), slip op. 11, including the qualifications and limitations on those principles. *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 813 (1989); *Briscoe* v. *LaHue*,

[9] See, *e.g.*, *United States* v. *Jewell*, 60 F.3d 20, 23 n.2 (1st Cir. 1995); *United States* v. *Brown*, 52 F.3d 415, 424, 426 (2d Cir. 1995), cert. denied, 516 U.S. 1068 (1996); *United States* v. *Kane*, 637 F.2d 974, 977-979 (3d Cir. 1981); *United States* v. *Kennedy*, 32 F.3d 876, 882-883 (4th Cir. 1994), cert. denied. 513 U.S. 1128 (1995); *United States* v. *Garcia Mendez*, 437 F.2d 85, 86 (5th Cir. 1971); *United States* v. *Nabors*, 901 F.2d 1351, 1354 (6th Cir.), cert. denied, 498 U.S. 871 (1990); *United States* v. *Buckley*, 4 F.3d 552, 558 (7th Cir. 1993), cert. denied, 510 U.S. 1124 (1994); *United States* v. *Maxwell*, 25 F.3d 1389, 1395 (8th Cir.), cert. denied, 513 U.S. 1031 (1994); *United States* v. *Manfredi*, 722 F.2d 519, 524 (9th Cir. 1983) (characterizing the issue as "settled"); *United States* v. *Dahlman*, 13 F.3d 1391, 1398 (10th Cir. 1993), cert. denied, 511 U.S. 1045 (1994); *United States* v. *Garcia*, 741 F.2d 363, 366-367 (11th Cir. 1984); *United States* v. *Bonner*, 874 F.2d 822, 826 (D.C. Cir. 1989) (describing "danger to the entering officers" as one of the "most common and compelling bases that establish exigency"); *United States* v. *Harris*, 435 F.2d 74, 81 (D.C. Cir. 1970). The Ninth Circuit was one of the first to recognize an officer-safety exception under Section 3109. See *Gilbert* v. *United States*, 366 F.2d 923, 932 (9th Cir. 1966), cert. denied, 388 U.S. 922 (1967).



460 U.S. 325, 330-331 (1983); cf. *State* v. *Bamber*, 630 So. 2d 1048, 1053 (Fla. 1994) (applying that principle in interpreting Florida's knock-and-announce statute); *People* v. *Maddox*, 294 P.2d 6, 8-10 (Cal.) (Traynor, J.) (same), cert. denied, 352 U.S. 858 (1956). And the Court has applied that reasoning to Section 3109. See *Sabbath*, 391 U.S. at 589 ("[L]inguistic analysis seldom is adequate when a statute is designed to incorporate fundamental values and the ongoing development of the common law.").[10]

[10] The courts of appeals' longstanding interpretation of Section 3109 as embodying an exception based on officer safety has solid roots in the common law. As this Court recently stated in *Wilson*, "because the common-law rule was justified in part by the belief that announcement generally would avoid 'the destruction or breaking of any house * * * by which great damage and inconvenience might ensue,' courts acknowledged that the presumption in favor of announcement would yield under circumstances presenting a threat of physical violence." 514 U.S. at 935-936 (citations omitted). The officer-safety exception was the first exception to the knock-and-announce requirement recognized by American courts, see *Read* v. *Case*, 4 Conn. 166, 170 (1822), and it has been widely adopted, both in States where the common law continues to govern execution of search and arrest warrants, see, *e.g.*, *Commonwealth* v. *Cundriff*, 415 N.E.2d 172, 177-178 (Mass. 1980); *State* v. *Johnson*, 230 A.2d 831, 836-837 (R.I. 1967), and in States with statutes similar to Section 3109, which express the knock-and-announce requirement in seemingly unqualified language, see, *e.g.*, *People* v. *Dumas*, 512 P.2d 1208, 1214 (Cal 1973) (en banc), *Benefield* v. *State*, 160 So. 2d 706, 710 (Fla. 1964) (arrest warrants); *Scull* v. *State*, 178 S.E.2d 720, 722-723 (Ga. Ct. App. 1970); *State* v. *Christiana*, 186 So. 2d 580, 583-585 (La.) (arrest warrants), cert. denied, 385 U.S. 835 (1966); *State* v. *Furry*, 286 N.E.2d 301, 305 (Ohio Ct. App. 1971). Indeed, one state supreme court recently noted that it was "not aware of any state which, by statute or case law, has rejected an exception to its knock and announce rule based upon an officer's

Respondent seeks to draw support for his reading of Section 3109 from its legislative history, but that history is consistent with an interpretation of Section 3109 that recognizes an exception for officer safety. Section 3109 was enacted as part of the Espionage Act of 1917, ch. 30, Tit. XI, §§ 8-9, 40 Stat. 229. The conference committee report explains that the search warrant title of the Act "was based upon the New York law on this subject, and follows generally the policy of that law." H.R. Conf. Rep. No. 69, 65th Cong., 1st Sess. 20 (1917); see also H.R. Conf. Rep. No. 65, 65th Cong., 1st Sess. 20 (1917).[11]

What evidence there is of the "policy" of the New York law generally supports our position that an exception was recognized for situations in which officers faced heightened peril if they announced their presence while executing the warrant. After the enactment of Section 3109, New York decisions upheld the common-law exception for officer safety under the state knock-and-announce law. See *People* v. *Montanaro*, 229 N.Y.S.2d 677, 684-685 (Kings Cty. Ct. 1962) (search); *People* v. *Goldfarb*, 229 N.Y.S.2d 620, 622-623 (N.Y. Cty. Ct. Gen'l Sess. 1962) (arrest); *People* v. *Cocchiara*, 221 N.Y.S.2d 856, 860-862 (N.Y.

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apprehension of peril." *State* v. *Ford*, 801 P.2d 754, 760 (Or. 1990).

[11] The New York law mentioned is the title of that State's code of criminal procedure addressing search warrants. See N.Y. Code Crim. Proc. §§ 791-813 (McKinney 1917). The Criminal Procedure Code was enacted in 1881. 1881 N.Y. Laws, ch. 442. The sections of the Espionage Act concerning forcible entry in the execution of search warrants did not appear in the original bill, but were added in conference. See H.R. Rep. No. 30, 65th Cong., 1st Sess. 8-9 (1917); H.R. Conf. Rep. No. 65, *supra*, at 20.



Cty. Ct. Gen'l Sess. 1961) (arrest). While those decisions were, of course, not known to the drafters of Section 3109, they are consistent with a 1913 decision of the New York Court of Appeals holding that the related sections of the State's criminal procedure code defining the grounds upon which a search warrant could be authorized were "the same in general character" as earlier codifications and the common law from which they all derived. *People ex rel. Simpson Co.* v. *Kempner*, 208 N.Y. 16, 22 (1913).[12]

Respondent's reliance (Br. 21-23) on the legislative history of the short-lived no-knock statutes of the early 1970s for his argument that there is no statutory exception for officer safety is similarly misplaced. In the Controlled Substances Act, Pub. L. No. 91-513, Tit. II, § 509(b), 84 Stat. 1274, Congress authorized magistrates to issue no-knock warrants in

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[12] Respondent relies somewhat on *Phelps* v. *McAdoo*, 94 N.Y.S. 265 (Sup. Ct. 1905), for the proposition that the New York knock-and-announce statute admitted of no exceptions, but that case does not support his contention. In *Phelps*, the court considered what it termed an "act of mob violence" by 25 policemen who, armed with axes, broke into a gambling parlor through the windows and smashed everything in sight. *Id.* at 266. The case's principal holding was that a provision of the New York City Charter allegedly authorizing such conduct was void because, so interpreted, it clearly conflicted with constitutional proscriptions against unreasonable searches and seizures. *Id.* at 268; see also *People* v. *O'Neill*, 60 N.Y.S.2d 246, 249 (App. Div. 1946) (citing *Phelps* for this proposition); *People* v. *Brinker*, 140 N.Y.S. 448, 449 (N.Y. City Mag. Ct. 1912) (characterizing *Phelps* this way) (McAdoo, Ch. City Mag.). Although *Phelps* mentioned the knock-and-announce statute in passing, it addressed neither the question of what circumstances generally warranted an exception nor the issue of whether officer safety was one of those circumstances.

drug searches when there was probable cause to fear that announcement would lead to the destruction of the drugs sought or would endanger the officers executing the warrant. In the District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, § 210, 84 Stat. 630, Congress authorized officers in the District of Columbia to execute search warrants permitting the breaking and entering of dwellings without prior announcement if such announcement would, among other things, lead to the destruction of the evidence sought or endanger the officers executing the warrant.

Four years later, Congress repealed both provisions. See Act of Oct. 26, 1974, Pub. L. No. 93-481, §§ (3), (4)(a), 88 Stat. 1455. In doing so, however, Congress made clear that it did not intend to disapprove of judicially recognized exceptions to the knock-and-announce requirement, including exceptions it had placed in those statutes and was now removing. The conference committee report on the repealing legislation noted that "[v]arious exceptions to the rule of announcement of identity and purpose before breaking and entering have been noted by the Supreme Court and by State and lower Federal courts." H.R. Conf. Rep. No. 1442, 93d Cong., 2d Sess. 5 (1974). "Furthermore," the report stated, "since the courts are continuing to define and explicate the exceptions to the announcement rule, the conferees do not intend the references in this statement to specific examples of exceptions (and the facts underlying them) as being an enumeration of the only exceptions to be permitted * * * . Rather, it is the intent of the conferees that the common law exceptions, as they may be prescribed by judicial decisions * * *, [will continue to] apply." *Ibid.* Thus, to the extent that the views of later Congresses are of any value in discerning the intent of earlier ones, see, *e.g.*, *O'Gilvie* v. *United States*, 117 S. Ct. 452, 458 (1996) (later views cannot control interpretation of earlier enacted statute), the views of the 93d Congress support the standard interpretation of Section 3109 as incorporating common-law exceptions to the knock-and-announce requirement. Cf. *United States* v. *Carter*, 566 F.2d 1265, 1268-1269 (5th Cir.) (in repealing no-knock statutes, Congress intended to retain common-law exceptions), cert. denied, 436 U.S. 956 (1978).



3. Respondent argues (Br. 49-50) that the search warrant in this case was void ab initio because the federal magistrate lacked statutory authority to issue a "no-knock" warrant. That contention is without merit.

Neither Section 3109 nor Federal Rule of Criminal Procedure 41 expressly addresses whether a magistrate may authorize a no-knock entry. Even on the assumption that the magistrate lacked authority to include a no-knock clause in the warrant—an issue no court of appeals has addressed—the legality of the search warrant itself would not be undermined. The magistrate's lack of no-knock authority would simply invalidate the warrant's no-knock clause, not the warrant as a whole. For example, when a portion of the affidavit supporting a probable cause determination is found to be knowingly or recklessly false, the warrant itself may stand if the untainted portions of the affidavit are sufficient to sustain the finding of probable cause. See *United States* v. *Karo*, 468 U.S. 705, 718 (1984); *Franks* v. *Delaware*, 438 U.S. 154, 171-172 (1978). Similarly, where part of a warrant is overbroad but the remaining portions are sufficiently particular, evidence seized under the valid portions of

the warrant generally need not be suppressed. See, *e.g.*, *United States* v. *Morris*, 977 F.2d 677, 682 (1st Cir. 1992), cert. denied, 507 U.S. 988 (1993). A severability principle makes equal sense here, where the allegedly invalid portion of the warrant concerns a subject—whether the officers may enter the premises without first announcing their presence—that is wholly distinct from the probable cause determination supporting the warrant's issuance. Cf. *Maryland* v. *Garrison*, 480 U.S. 79, 84 (1987); *Dalia* v. *United States*, 441 U.S. 238, 258 (1979).

The ultimate legality of the officers' decision to dispense with knocking and announcing rests not on the validity of the warrant's no-knock clause, but on the objective reasonableness of their judgments about the circumstances they confronted at the time of the search. See *Ker* v. *California*, 374 U.S. 23, 40 n.12 (1963) (plurality opinion). Respondent's position, however would penalize officers who take the precaution of testing the reasonableness of their judgments in front of a detached and neutral magistrate. This Court has approved the warrant process as a valuable check on police conduct when it comes to probable cause determinations. See, *e.g.*, *United States* v. *Leon*, 468 U.S. 897, 913-914 (1984). In light of that principle, penalizing the officers here for seeking a warrant would be anomalous. See also Pet. App. 22a n.1 (Kozinski, J., dissenting) (noting that no-knock search here was less troublesome than those in earlier Ninth Circuit cases because officers here sought and received a no-knock warrant); see also *Richards*, 117 S. Ct. at 1422 n.7 ("The practice of allowing magistrates to issue no-knock warrants seems entirely reasonable when sufficient cause to do so can be demonstrated ahead of time.").



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For the foregoing reasons, as well as those stated in our opening brief, the judgment of the court of appeals should be reversed.

SETH P. WAXMAN
*Solicitor General*

DECEMBER 1997

(9)

Supreme Court, U.S.
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No. 96-1469

# *In The*
# *Supreme Court of the United States*

October Term, 1996

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**UNITED STATES OF AMERICA,**
*Petitioner,*

**vs.**

**HERNAN RAMIREZ,**
*Respondent.*

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ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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## BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., JOINED BY THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., AND THE NATIONAL SHERIFFS' ASSOCIATION IN SUPPORT OF THE PETITIONER.

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No. 96-1469

# *In The Supreme Court of the United States*

October Term, 1996

UNITED STATES OF AMERICA,
*Petitioner,*

vs.

HERNAN RAMIREZ,
*Respondent.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

# BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., JOINED BY THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., AND THE NATIONAL SHERIFFS' ASSOCIATION IN SUPPORT OF THE PETITIONER.

This brief is filed pursuant to Rule 37 of the United States Supreme Court. Consent to file has been granted by respective Counsel for the Petitioner and Respondent. The letters of

consent have been filed with the Clerk of this Court, as required by the Rules.[1]

## INTEREST OF *AMICI CURIAE*

**Americans for Effective Law Enforcement, Inc. (AELE),** as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties, and property, within the framework of the various state and federal constitutions.

**AELE** has previously appeared as *amicus curiae* over 100 times in the Supreme Court of the United States and over 35 times in other courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio, and Missouri.

**The International Association of Chiefs of Police, Inc. (IACP),** is the largest organization of police executives and line officers in the world, consisting of more than 14,000 members in 72 nations. Through its programs of training, publications, legislative reform, and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

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[1] As required by Rule 37.6 of the United States Supreme Court, the following disclosure is made: This brief was authored for the *amici* by James P. Manak, Esq., counsel of record; Professor Emeritus Fred E. Inbau, Esq., Northwestern University School of Law; and Wayne W. Schmidt, Esq., Executive Director of Americans for Effective Law Enforcement, Inc. No other persons authored this brief. Americans for Effective Law Enforcement, Inc., made the complete monetary contribution to the preparation and submission of this brief, without financial support from any source, directly or indirectly.



**The National Sheriffs' Association (NSA),** is the largest organization of sheriffs and jail administrators in America, consisting of over 40,000 members. It conducts programs of training, publications, and related educational efforts to raise the standard of professionalism among the nation's sheriffs and jail administrators. While it is interested in the effective administration of justice in America, it strives to achieve this while respecting the rights guaranteed to all under the Constitution.

*Amici* are national professional associations representing the interests of law enforcement agencies at the state and local levels. Our members include: (1) law enforcement officers and law enforcement administrators who are charged with the responsibility of executing and overseeing the process of arrest and search warrants within the bounds of the law; and (2) police legal advisors who, in their criminal jurisdiction capacity, are called upon to advise law enforcement officers and administrators in connection with such matters, including the formulation and implementation of policy on the execution of arrest and search warrants.

Because of the relationship with our members, and the composition of our membership and directors–including active law enforcement administrators and counsel–we possess direct knowledge of the impact of the ruling of the court below, and we wish to impart that knowledge to this Court.

## STATEMENT OF THE CASE

The court below, *United States v. Ramirez*, 91 F.3d 1297 (9th Cir. 1996), ruled that an exigency supporting a no-knock entry of a dwelling accomplished through the destruction of property must be stronger than a "mild exigency" that suffices to justify a no-knock entry without property damage. It ruled that the facts–a suspect being sought at another person's home had knocked down a law enforcement officer in escaping from custody, had declared that he would not do a lengthy federal

sentence he was facing, had struck an officer and rammed a police vehicle in another escape attempt, and had threatened to kill witnesses–did not provide sufficient exigency to justify a police officer's breaking of a window and poking a gun through it when executing the no-knock warrant in this case.

## SUMMARY OF ARGUMENT

*Amici* take the position that the "stronger than mild exigency" rule adopted by the court below:

1. Does not comport with existing law on the subject;
2. Is not compelled by this Court's interpretation of reasonableness under the Fourth Amendment concerning the execution of warrants on private premises as established in *Wilson v. Arkansas*, 115 S. Ct. 1914 (1995);
3. Would place the lives of police officers in serious jeopardy if adopted by this Court; and
4. The officers in this case acted in good faith within the purview of *United States v. Leon*, 468 U.S. 897 (1984).

## ARGUMENT

POLICE OFFICERS NEED NOT POSSESS MORE SPECIFIC EVIDENCE OF DANGER TO THEMSELVES OR OTHERS IN ORDER TO JUSTIFY A NO-KNOCK ENTRY IN WHICH THEY DAMAGE A DOOR OR WINDOW THAN WOULD BE REQUIRED TO JUSTIFY A NO-KNOCK ENTRY MADE WITHOUT DAMAGE TO PROPERTY. TO REQUIRE THE LEVEL OF EVIDENCE OF DANGER INDICATED BY THE COURT BELOW WOULD SERIOUSLY COMPROMISE OFFICER SAFETY.

*Amici* will not repeat the arguments of petitioner, United States of America, which we support, except to point out that under the rule adopted by this Court in *Wilson*, *supra*, when officers are serving warrants on private premises and they have reasonable suspicion to believe they are in peril and need the element of surprise, it should not matter whether the fortuity of



an unlocked door or open window gives them the right to execute an unannounced entry without breaking property.

As stated in *Dalia v. United States*, 441 U.S. 238, 257 n.19 (1979), "[O]ften it is impossible to anticipate when [it] will be necessary" for officers to engage in "forceful breaking and entering * * * to effect a warranted search."

In such cases, the primary need for officers to protect themselves–or to avoid the destruction of evidence–is that of surprise. This element of surprise is the same whether or not minor property damage is involved (*amici* note that in this case the damage was truly *de minimis*: a garage window was broken as a diversionary tactic).

With knowledge that the person the officers were seeking was dangerous, as found by the magistrate who issued the no-knock warrant under 18 U.S.C. § 3109, the officers were not only justified in using the minor tactic they chose, but reasonable officers in the same position, based upon the totality of the circumstances, undoubtedly would have and could have done the same thing. *United States v. Leon*, *supra*. To place a burden of an "extra exigency" upon the officers for minor property damage to protect themselves or avoid the destruction of evidence is not only unsupported by the Fourth Amendment reasonableness requirement, but is counter-productive to officer safety.

The conduct of the officers in this case was entirely in keeping with the interest of this Court in the safety of police officers when performing proper law enforcement functions, *e.g.*, *Maryland v. Wilson*, 117 S. Ct. 882 (1997) (traffic stops); *Maryland v. Buie*, 494 U.S. 325 (1990) (protective sweeps of premises); *Terry v. Ohio*, 392 U.S. 1 (1968) (detentions for investigation). The degree of certainty expected by the court below in order to justify minor property damage is unrealistic and totally out of step with the interest in officer safety exhibited by this Court. There is good reason for concern for

officer safety in cases involving the execution of arrest and search warrants on premises.

*Amici*, as law enforcement administrators, can cite from our experience many instances where officers have been killed or injured while serving such warrants. In some cases there was little to suggest specific danger to the officers as they knocked and announced their entrance and were met with a hail of bullets or other assaultive resistance. In other cases where officers were specifically authorized by a judicial officer to serve their warrants without knocking and announcing, their reasonable conduct was likewise met with deadly resistance.

Calibre Press, Inc., of Northbrook, Illinois, a national training and publishing organization dealing with police officer safety issues, cites these representative examples of the dangers of which we speak:

- In July 1987 three police officers were shot dead while serving an arrest warrant for a bad check violation and an eviction notice on an elderly woman and her three sons at a motel. Documented by an article in *The Detroit News*, July 10, 1987, at A1.

- On February 8,1978, police officers serving a "high risk search warrant" at a home occupied by a motorcycle gang, did knock and announce their presence, even though later facts developed in the case showed that the gang planned to ambush the officers. Two officers were injured when struck by gunfire from within the house. Documented by letter of Lt. Jack H. Redfield, Klamath Falls Police Department, Klamath Falls, Oregon, dated July 10, 1997, to the Calibre Press Street Survival Newsline.

- On March 2, 1986, an officer, who was serving a warrant for narcotics without first knocking and announcing his presence, was hit in the stomach by a bullet fired through



the door of an apartment as he attempted to go through the door. Only the fact that he was wearing Kevlar armor saved his life. Documented by letter of Lt. Michael Doane, Lexington-Fayette Urban County Police Department, Lexington, Kentucky, dated July 6, 1997, to the Calibre Press Street Survival Newsline.

- In September 1992, officers served a knock and announce search warrant on a person suspected of selling LSD. The subject "had very little in the way of criminal history. His background did not indicate he was a violent person." After knocking and announcing their presence and entering the apartment, they found the subject in a bedroom. Before the police could even open the bedroom door, the subject fired five shots from a revolver, hitting a police officer in the head. Only the fact that the officer was wearing a Kevlar helmet saved his life. Documented by letter of Lt. Ron Merideth, El Centro Police Department, El Centro, California, dated July 9, 1997, to the Calibre Press Street Survival Newsline.

These[1] are just a handful of examples that *amici* know from experience exist in great numbers. We know that the service of warrants on private residences ranks among the most dangerous activity in which officers can engage.

We believe the eloquent dissent of Circuit Judge Kozinski in the court below best summarizes the Ninth Circuit's rule in this case: that the court has painted an unreal picture of "every man's 'little castle,'" but that such a "castle" often looks like a fortress to the police from the outside and they can never be certain of the danger that lurks within. Such a quaint view of "every man's 'little castle'" depicted by the majority overlooks

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[1] Copies of these materials are available from Counsel of Record, James P. Manak, at the address listed in the inside front cover of this brief.

the reality of modern criminal conduct that the police must deal with every day.

Judge Kozinski also alluded to the fact that it would hardly deter the police from unconstitutional conduct directed toward one person (the subject of the warrant in this case) when evidence obtained against another (the defendant) is discovered and suppressed. As noted in *Durham v. United States*, 403 F.2d 190, 196 (9th Cir. 1968): "The price is too high and the advantage too uncertain to make it reasonable to suppose that law enforcement officers will be encouraged to indulge in unlawful searches, knowing that what they find will be suppressed, in the hope of obtaining admissible evidence as remote and fortuitously acquired as this."

*Amici* submit that the officers in the instant case acted in objective good faith based on the totality of the circumstances known to them at the time of their actions. It is certain that to construct an added exigency evidentiary requirement, as the court below has done, for cases involving minor property damage in serving no knock warrants will cost the lives of many police officers in the future.



## CONCLUSION

*Amici* urge this Court to reverse the decision of the court below on the basis of the precedents of this Court and sound judicial policy.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES
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UNITED STATES OF AMERICA,

Petitioner,

v.

HERNAN RAMIREZ,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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# BRIEF FOR OHIO, ALABAMA, ALASKA, ARKANSAS, CALIFORNIA, DELAWARE, FLORIDA, HAWAII, IDAHO, ILLINOIS, KANSAS, LOUISIANA, MARYLAND, MICHIGAN, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OKLAHOMA, GOVERNMENT OF PUERTO RICO, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, VERMONT, COMMONWEALTH OF VIRGINIA, AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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## STATEMENT OF *AMICI* INTEREST

*Amicus curiae* State of Ohio and 29 other *amici* States and Territories write to support the United States and to urge the Court to reverse the decision below.

Like the federal government, the *amici* States have enacted a variety of criminal laws that they are responsible for enforcing. In meeting that responsibility, they are deeply concerned about legal requirements that make the already-perilous job of law enforcement still more perilous, particularly with respect to the difficult task of apprehending alleged criminals. In this instance, the Ninth Circuit's efforts to balance the Fourth Amendment's bookend considerations of security and individual liberty failed to account for the real-world security risks that police officers face and improperly saddled them with a search-and-seizure burden that the Fourth Amendment does not require. As the federal statute governing such searches, 18 U.S.C. §3109, does not apply to the States, this brief expresses a view concerning only the propriety of the police officers' actions under the Fourth Amendment.

## SUMMARY OF ARGUMENT

In measuring the reasonableness of a search under the Fourth Amendment, the Court first looks to history to determine whether a relevant tradition informs the content of the provision, then (if necessary) balances the law enforcement security interests presented against the individual liberty interests allegedly infringed. *See Wilson v. Arkansas*, 115 S. Ct. 1914 (1995). The Ninth Circuit's decision -- holding that unannounced entries causing property damage require more proof of exigency that those that do not -- is unsupported by history, balancing, case law or common sense.



*Wilson v. Arkansas* and *Richards v. Wisconsin*, 117 S. Ct. 1416 (1997), go a long way to answering the question presented. *Wilson* confirms that one of the elements of the reasonableness inquiry is whether the police officers complied with the common law requirement that law enforcement announce its presence before forcibly entering a residence. And *Richards* establishes that officers may abandon this formality when it would be "dangerous or futile" or would "inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence." 117 S. Ct. at 1421.

Neither the text of the Fourth Amendment, *Wilson* nor *Richards* requires officers to meet two tests, rather than just one test, for establishing exigency. Either the officer has established the requisite risk to self or the objects of the search warrant, or the officer has not. Once officers meet this initial requirement, they are free to proceed with a surprise entry, even one that does in fact cause property damage, so long as any damage to property is incidental to the underlying search. The English common law experience is equally silent when it comes to embracing a rule by which officers must meet a new quantum of proof after an initially-permissible entry suddenly evolves into one concretely requiring the breaking of property. Nor have the States, either before or after 1791 and 1868, established multi-exigency requirements under the search-and-seizure requirements of their own Constitutions.

Balancing does not advance the Ninth Circuit's novel test either. *Wilson*, *Richards* and the common law do all of the security/liberty weighing that the Fourth Amendment requires. One of the reasons for the knock-and-announce requirement in the first place was the liberty interest in avoiding needless damage to property. *Wilson*, 115 S. Ct. at 1918-1919. Having given criminal defendants the benefit

of this interest once, the Fourth Amendment does not give defendants the benefit of the interest a second time. Neither law enforcement nor individuals are entitled to double count under the amendment.

A contrary approach, at any rate, would not be workable and would not meaningfully serve the values of the Fourth Amendment. First, such an intermediate burden of proof is not likely to be quantifiable or knowable. It would simply bring new unpredictability to a setting already laden with uncertainty. Second, a double-counting requirement would as likely aid officers as suspects. When it becomes necessary for officers to damage property (*e.g.*, break a window or door), any element of surprise quickly dissipates. The breaking of property therefore is apt to create new peril for the officer and add to, not subtract from, the initial explanation for commencing a forcible entry. Third, the addition of property values to the Fourth Amendment scale overprotects the well-to-do and underprotects the down-trodden. How could it be that the poor (who cannot afford to fix the lock on the door), the forgetful (who forget to lock the door) or the trusting (who choose not to lock the door) have fewer rights to "security" from "unreasonable searches" than their wealthy, conscientious, or less trusting neighbors? The Fourth Amendment applies as vigorously to the one group as it does to the other because the bedrock securities provided by the guarantee do not turn on haphazard fortuities, be they the size of an individual's house or the number of bolts on one's door.



## ARGUMENT

### THE COURT OF APPEALS ERRED IN CONCLUDING THAT POLICE OFFICERS MUST SHOW ADDITIONAL EXIGENCIES WHEN MAKING A NO-KNOCK ENTRY THAT CAUSES INCIDENTAL PROPERTY DAMAGE.

*Wilson v. Arkansas*, 115 S. Ct. 1914 (1995), and *Richards v. Wisconsin*, 117 S. Ct. 1416 (1997), set the initial terms for assessing the validity of a police officer's unannounced entry into a residence to execute a search warrant in light of "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV.

*Wilson* makes clear that the issuance of a search warrant does not extinguish the privacy rights of the objects of a search. A continued "element of the reasonableness inquiry" is whether the officers who execute the search warrant satisfy "the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing," including the requirement that officers knock and announce their presence before forcibly entering a building. *Wilson*, 115 S. Ct. at 1915.

*Richards*, at the same time, establishes an important exception to the *Wilson* rule. It says that the Fourth Amendment permits officers to abandon an announcement when it "would be dangerous or futile" or "would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence." *Richards*, 117 S. Ct. at 1421.

In the decision below, the Ninth Circuit attempted to take these cases one step further. It held that police officers who otherwise have authority to make an unannounced entry under the *Richards/Wilson* standard must establish still more risks to themselves or evidence when making an entry that causes property damage to the house for which a search warrant has been issued. Failure to do so, the court held, requires suppression of the evidence. Because neither the words of the amendment, the common law, State practices, precedent from this Court nor common sense requires such a test, we respectfully submit that the Ninth Circuit erred in engrafting this new consideration onto the Fourth Amendment.

## A. The Text And Context Of The Fourth Amendment Do Not Establish A Multi-Exigency Requirement.

Nothing about the words of the Fourth Amendment compels police officers to satisfy two levels of exigency in making forcible entries while executing a valid search warrant -- one to justify the surprise, the other to justify any damage to the owner's property. By its terms, the amendment focuses primarily on privacy, protecting in this instance the "right" to individual "security" in one's "house[]." The provision thus does not protect residences for their own sake but because people live in them and because people are entitled to feel secure from unreasonable intrusions when they retreat to the privacy of their homes. *See Katz v. United States*, 389 U.S. 347, 351 (1967) ("the Fourth Amendment protects people, not places"). *Cf. Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294, 304 (1967) (the "principal" object of the Amendment is the protection of privacy rather than property).



The amendment no doubt also preserves the general source of this expectation of privacy -- the ownership of property and what comes with it, the right to keep people out. And that is particularly true in the context of limitations on "seizures" of property, in which the limitation on the owner's possessory interest frequently is separate and apart from any invasion of the owner's privacy. *Soldal v. Cook County*, 506 U.S. 56 (1992) (stating that "the Amendment protects property as well as privacy" in invalidating seizure of mobile home). *See United States v. Good Real Property*, 510 U.S. 43 (1993). But that is not to say that the amendment requires law enforcement to meet additional tests above and beyond that already required by the Fourth Amendment simply because property is involved. Still less is that true when the exigency requirement established by the knock-and-announce rule exists in part to allow the occupant to protect his or her own property interests. *Wilson*, 115 S. Ct. at 1918-1919.

Other amendments and other statutes, it bears emphasizing, further protect against improper damage to property by government officials. Whether it be the Fifth and Fourteenth Amendments' prohibition against depriving property without due process or taking it without just compensation, or whether it be statutory causes of action provided by the federal and State governments for property damage occurring in this context, *see* Federal Tort Claims Act, 28 U.S.C. 2671, *et seq.*, Ind. Code Ann. § 35-33-5-7, N.M.S.A. 41-4-12 (New Mexico), O.R.C. 2933.231(D)(2) (Ohio), individuals have other recourses besides the exclusionary rule to vindicate these property interests.

## B. No Multi-Exigency Requirement Existed At Common Law.

In assessing the reasonableness of a challenged search, the Court also looks "to the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing." *Wilson*, 115 S. Ct. at 1916. If a relevant tradition exists, one that suggests a meaning of the provision "ascribed to it by the Framers of the Amendment," *id.*, then the pre-ratification common law either may end the matter (if it speaks clearly to the situation at hand) or may offer guidance as to what the guarantee means, *see id.*

In this instance history offers a partial, but not a complete, answer to the question presented. All agree that one of the explanations for the knock-and-announce requirement at common law was the prevention of gratuitous damage to property. By announcing themselves, officers gave suspects an opportunity to let the officers in without the need for a forcible and potentially property-damaging entry. *Semayne's Case*, 5 Coke 91, 77 Eng. Rep. 194, 195-196 (K.B. 1603) ("the law . . . abhors the destruction or breaking of any house (which is for the habitation of man) by which great damage and inconvenience might ensue to the party when no default is in him"); *see Wilson*, 115 S. Ct. at 1918-1919.

But, at the same time, no common-law tradition required the sheriff to satisfy two gradations of exigency prior to entry. Either an exigency justified the unannounced entry or it did not. Once an exigency had been established, no courts required the sheriff then to pinpoint other exigencies each time property was incidentally damaged in the course of pursuing the by-then-established dangerous suspect or of preserving the by-then-established disposable



evidence. Indeed, to the State *amici*'s knowledge, not a single case from the pre-ratification English or colonial common law experience embraced such a multi-part showing.

One understandable limit on the sheriff's authority did exist, however. Law enforcement could not damage property for the sake of damaging it in the course of an investigation. Any damage had to be incidental to the need for a surprise entry, and thus "without unnecessary violence," *Barnard v. Bartlett*, 64 Mass. 501 (1852), with "no more force than was necessary," *Hubbard v. Mack*, 17 Johns. R. 127 (NY Sup. Ct. 1819). Still, the "longstanding requirement[] that the officers . . . avoid unnecessary damage to the premises," a limitation applicable to all searches and seizures, 2 LaFave, *Search and Seizure*, 4.10(d), at 673-674, does not advance the rule embraced by the Ninth Circuit. The pre-existing limitation on wholly unwarranted property damage in the course of executing a warrant circumscribes the whole entry, whereas the court of appeals adopted a separate and additional showing required to make the entry itself. This new rule has no foundation in the common law that gave birth to the knock-and-announce requirement and in the end disserves the careful balance between liberty and security established by the venerable rule.

## C. No Multi-Exigency Requirement Existed, Or Exists, Under State Law.

Nor have any of the States on their own established the kind of multi-exigency showing that the Ninth Circuit demanded. Like the United States Constitution, virtually all of the State Constitutions protect the privacy of their citizens from unreasonable searches and seizures, many of them through provisions predating and serving as models for the Fourth Amendment. *See, e.g.*, Ala. Const. art. I, §5; Ark. Const. art. 2, §15; Conn. Const. art. I, § 7; Del. Const. art

I, § 6; La. Const. art. I § 5; Neb. Const. art. 1, §7; Nev. Const. art. 1, § 18; N.D. Const. art. I §8; P.R. Const. art. II, §10; R.I. Const. art 1, § 6; Wyo. Const. art 1, §4. *See generally* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977). And many of the States by statute specifically establish knock-and-announce requirements. *See e.g.*, Rev. Code Wash. §10.31.040; N.D. Cent. Code §29-29-08; Cal. Pen Code §1531; NY CLS CPL §690.50; HRS §803-37(Hawaii); O.C.G.A.§17-5-27(Georgia).

Yet, as at common law, none of the States has ever distinguished between "breakings" that require property damage and those that do not. One exigency standard governs all exceptions to the announcement rule. *See, e.g.*, *State v. Miller*, 7 Wash. App. 414 (1972); *State v. Sakellson*, 370 N.W. 2d 779 (N.D. 1985); *People v. Rodriguez*, 274 Cal. App.2d 770 (1969); *People v. Tracy*, 195 Cal. App. 3d 1402 (1987); *People v. Peterson*, 9 Cal. 3d 717 (1973); *People v. Rogers*, 59 Ill. App.3d 396 (1978); *Jewel v. Mills*, 66 Ky. (3 Bush) 62 (1867).

**D. No Multi-Exigency Requirement Is Compelled By The Fourth Amendment's Balancing Requirement.**

In measuring the reasonableness of a search, the Court also balances "the asserted governmental interests in preserving evidence" against the "individual privacy interests intruded upon" when the common law does not establish a dispositive tradition. *Richards*, 117 S. Ct. at 1421-1422 ; *Wilson*, 115 S. Ct. at 1916; *Pennsylvania v. Mimms*, 434 U.S. 106, 109 (1977). Even such balancing, however, does not advance respondent's cause because any weighing of competing interests that the Fourth Amendment requires, the knock-and-announce rule already provides.



On the security side of the ledger, the Court has frequently noted the "weighty interest in officer safety." *Maryland v. Wilson*, 117 S. Ct. 882, 885 (1997). That consideration has special application in the context of the perilous enterprise of enforcing State narcotics laws, where the knock-and-announce rule frequently applies. "Statistics indicate that drug related violence is a growing contributor to police mortality. From 1977 to 1986, 6.5% or 57 of 875 slain officers died in situations involving drug crimes. In 1985, 7.6% of police murders were drug related, and in 1986, 10.6% of police murders involved drug matters." Allegro, *Police Tactics, Drug Trafficking, and Gang Violence: Why The No-Knock Warrant Is An Idea Whose Time Has Come*, 64 Notre Dame L. Rev. 552, 558 n.32 (1989) (statistics extracted from Federal Bureau of Investigation, Crime In The United States; Uniform Crime Reports 1977-1986). Recent statistics show that between 1985-1994, 53 of 708 slain officers died in drug related matters. Uniform Crime Reports, Law Enforcement Officers Killed and Assaulted 1994, at 31, 34.

Regrettably, statistics do not reveal the numbers of officers assaulted during the execution of warrants, let alone during the execution of warrants in drug cases or in the context of the pursuit of an escaped felon. However, the sheer number of injuries, together with this Court's cases, confirm the dangers inherent in such work. *See Michigan v. Summers*, 452 U.S. 692, 702 (1981); *Ker v. California*, 374 U.S. 23, 28 n.3 (1963).

On the individual liberty side of the ledger, the Court has frequently observed that individuals have a strong interest in protecting the privacy of their homes from unwarranted intrusions. *See Wilson*, 115 S. Ct. at 1916; *Maryland v. Buie*, 494 U.S. 325, 331 (1990). While the valid issuance of a search warrant, as here, diminishes those interests, it does

not extinguish them altogether. *Richards*, 117 S. Ct at 1421 n.5.

But these balancing requirements do not aid respondent because the knock-and-announce rule already accounts for the weighing of these interests. It does all of the balancing of individual liberties and officer security, in short, that the Fourth Amendment requires. In explaining one of the justifications for the announcement requirement, *Wilson* properly relied on the individual's liberty interest in being given a chance to admit the officers without damage to property. 115 S. Ct. at 1918-1919. No precedent from this Court, however, requires double counting, either on the security or the liberty side of the Fourth Amendment scale.

Such a requirement, moreover, would demand a lot from police officers who frequently must make quick judgments about when, how, or even whether, to proceed in trying to apprehend a criminal suspect. Two tests, instead of just one, would govern their conduct. They would first have to ask themselves whether the circumstances warranted a surprise entry. Then, if it did, they would have to establish additional exigencies when it became necessary to damage property in the course of the surprise entry. In view of the requisite need for surprise that prompted the initial decision to proceed unannounced, it is hard to imagine there being sufficient time to identify in any meaningful way other exigencies that would justify continuing with the already-begun entry. The hair-splitting distinctions that this new intermediate test would require police officers to make would itself imperil their safety, and indeed would probably lead to imprecise second-guessing in the courts. *See Griffin v. United States*, 502 U.S. 46, 58 (1991) (rejecting as unworkable a due process argument that "posits two different degrees of failure of proof -- a failure that is *sufficiently*



insufficient, to which *Turner* would apply, and one that is insufficiently insufficient, to which *Yates* would apply").

A separate role for property damage, above and beyond that which spawned the knock-and-announce rule in the first instance, also would not invariably help suspects of criminal activity. The chief explanation for forcible entries after all is the element of surprise. Yet an unannounced entry that requires damage to property (*e.g.*, a broken window or door) runs the risk of alerting suspects that visitors are afoot. At that point, the suspects's knowledge that law enforcement may be present further imperils officers, as it gives the suspects a chance to arm themselves, destroy evidence, or attack the officers using their superior knowledge of the inside of the house. In other words, if there is to be double counting here, it applies to individual liberties *and* officer protection, and more often than not will further tilt the scales in the officers' direction.

Finally, and perhaps most problematically, the time-honored protections served by the Fourth Amendment do not turn on chance or property wealth. By making officers establish additional justification for a forcible entry that requires damage to property, the Ninth Circuit's test makes the guarantees offered by the Fourth Amendment a victim of fortuities and wealth, rather than a steadfast safeguard for all people and all occasions. How can it be that the poor (who cannot afford to fix the lock on a door), the forgetful (who forget to lock a door) or the trusting (who choose not to lock a door) have fewer rights to "security" from "unreasonable searches" than their wealthy, conscientious, or less trusting neighbors? The Fourth Amendment protections offered to the one group apply equally to the other, because the guarantee's vitality does not turn on haphazard fortuities, most particularly the size of a man's castle or the number of locks on his or her door.

## CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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In The
# Supreme Court of the United States
October Term 1997

UNITED STATES OF AMERICA,
*Petitioner,*

v.

HERNAN RAMIREZ,
*Respondent.*

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

## AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

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In The

# Supreme Court of the United States

**October Term 1997**

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UNITED STATES OF AMERICA,
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HERNAN RAMIREZ,
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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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## AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

---

This brief is filed under S.Ct.Rule 37. Consent to file has been granted by counsel for petitioner and respondent, and the letters were filed with the clerk by them as required by the rule.[1]

---

[1] *S.Ct.Rule 37.6 disclosure:* This brief was authored by John Wesley Hall, Jr., a member of the Board of Directors of

## INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a private non-profit voluntary bar association of criminal defense lawyers organized under the laws of the District of Columbia. It was organized in 1958. NACDL has about 9,200 direct members, 82 state and local affiliates, and about 30,000 affiliate members. At least 90% of NACDL's membership is comprised of practicing criminal defense lawyers who have intimate knowledge of the criminal justice system.

NACDL's mission, as stated in Art. II, § 1 of its Bylaws is:

> Ensure justice and due process for persons accused of crime
>
> Foster the integrity, independence and expertise of the criminal defense profession
>
> Promote the proper and fair administration of criminal justice

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> (e) To preserve, protect and defend the adversary system of justice and the Constitution.

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## SUMMARY OF ARGUMENT

**I.** The holding below imposes a higher burden on the government when property is broken to make a "no-knock" entry. That holding is justified by prior cases of this Court.

Protection of the home is a core value of the Fourth Amendment that justifies greater protection in any entry of the home. Also, "the Fourth Amendment protects people; not places." Our understandings as a society are such that greater respect is due the home in this context. Thus, our

societal understanding is that certain areas, like the home, deserve the most scrupulous protection from governmental action.

The common law view is that property should not be broken without great justification. Common law authorities also hold that a greater justification is required when the purpose is to search for a fugitive and not just conduct a search.

The Court's statement last Term in *Richards v. Wisconsin* that reasonable suspicion alone was enough to justify dispensing with announcement is dicta because it cites no binding authority. The cases relied on do not support that holding.

Other cases of this Court, however, such as the administrative search cases, require at least some kind of probable cause for those searches. Therefore, a higher level of justification for a breaking to conduct a "no-knock" entry is required.

**II.** This type of search involves violence and intimidation. Breaking the glass of an occupied house to make a forcible police entry in the middle of the night is not a *de minimus* intrusion.

It is not disputed that some amount of control of this situation by police is required. It is a fact of life that people will die during these types of raids; police and citizens.

Here, the police turned a window into a "gunport" by jamming an assault rifle through the glass. This was done to intimidate and control the occupants. The officer presumably would have used the weapon against the occupants, and the government also uses stun grenades to disorient occupants. These are not mere *de minimus* breakings into the home under the Fourth Amendment.



## ARGUMENT

### I.

**The Ninth Circuit's rule in this case, which imposes a higher burden on the government to make a "no knock" entry when property is broken, is required by the Fourth Amendment.**

### A. Protection of the home is a core value of the Fourth Amendment that justifies greater protection from police intrusions

The Fourth Amendment to the U.S. Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." This Court has accordingly repeatedly held that "It is axiomatic that 'physical entry into the home is the chief evil against which the wording of the Fourth Amendment is directed.' " *Welsh v. Wisconsin*, 466 U.S. 740, 748 (1984) (quoting *United States v. United States District Court*, 407 U.S. 297, 313 (1972)); *Payton v. New York*, 445 U.S. 573, 584-85 (1984); *Michigan v. Summers*, 452 U.S. 692, 700 n. 13 (1981); *New York v. Harris*, 495 U.S. 14, 18 (1990); *Maryland v. Buie*, 494 U.S. 325, 341 (1990). In *Payton*, 445 U.S. at 589-90, this Court said:

> But the critical point is that any differences in the intrusiveness of entries to search and entries to arrest are merely ones of degree rather than kind. The two intrusions share this fundamental characteristic: the breach of the entrance to an individual's home. The Fourth Amendment protects the individual's privacy in

a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home —a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their . . . houses . . . shall not be violated." That language unequivocally establishes the proposition that "[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States,* 365 U.S. 505, 511.

**B. "[T]he Fourth Amendment protects people, not places"; our societal understandings**

**1. Societal understandings and the Fourth Amendment**

Our societal understandings control much of the Fourth Amendment's course. Justice Harlan explicated the reasonable expectation of privacy standard in *Katz v. United States,* 389 U.S. 341, 361 (1967) (HARLAN, J., concurring):

> As the Court's opinion states, "the Fourth Amendment protects people, not places." The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a "place." My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is



prepared to recognize as "reasonable."

There is a "societal understanding that certain areas [like the home] deserve the most scrupulous protection from governmental action." *Oliver v. United States,* 466 U.S. 170, 178 (1984) (bracketed material added).

The law of standing is governed by the reasonable expectation of privacy standard, and it, too, is premised upon "understandings that are recognized and permitted by society." *Rakas v. Illinois,* 439 U.S. 138, 144 n.12 (1978), also quoting Justice Harlan in *Katz.* Because of these societal understandings, the Court has held that overnight guests have standing to challenge a search of the part of the premises they are staying in. *Minnesota v. Olson,* 495 U.S. 91, 98-99 (1990) ("To hold that an overnight guest has a legitimate expectation of privacy in his host's home merely recognizes the everyday expectations of privacy that we all share. Staying overnight in another's home is a longstanding social custom that serves functions recognized as valuable by society.").

The Court has also looked to societal values in finding that the Fourth Amendment was not violated. *See, e.g., California v. Greenwood,* 486 U.S. 35, 43-44 (1988) (trash search); *Oliver,* 466 U.S. at 182-83 (open fields); *United States v. Jacobsen,* 466 U.S. 109, 122 n. 22 (1984) (field test of drugs).

**2. Thus, property interests alone do not control**

As already stated from *Katz,* 389 U.S. at 351, "the Fourth Amendment protects people, not places" wherever they have an expectation of privacy. And, "[o]nce this much is acknowledged, and once it is recognized that the Fourth Amendment protects people—and not simply 'areas'

—against unreasonable searches and seizures it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure." *Id.* at 353. Property interests do not control; *Warden v. Hayden,* 387 U.S. 294, 304 (1967); and a trespass is not even required to make a Fourth Amendment violation. *Silverman v. United States,* 365 U.S. 505, 511 (1961). "This inquiry necessarily focuses on personal interests in privacy and liberty recognized in a free society." *California v. Ciraolo,* 476 U.S. 207, 220 n. 5 (1986) (POWELL, J., dissenting).

### 3. There is no distinction for "worthy" or "unworthy" dwellings based on how they are locked

The *amici* states argue that "the time-honored protections served by the Fourth Amendment do not turn on chance or property wealth," and the Ninth Circuit's rule in this area actually promotes class distinctions and in this situation would turn on "haphazard fortuities" and the size of and number of locks on a home. Ohio Br. 12.

This is incorrect. This Court has already held in *Sabbath v. United States,* 391 U.S. 585, 590 (1968), that with regard to 18 U.S.C. § 3109, "[t]he protection afforded by, and the values inherent in, § 3109 must be 'governed by something more that the fortuitous circumstance of an unlocked door.' " The same must be true under the Fourth Amendment.

In addition, the Fourth Amendment does not recognize any distinction between "worthy" and "unworthy" containers; *United States v. Ross,* 456 U.S. 798, 822 (1982); or vehicles; *California v. Carney,* 471 U.S. 386, 394 (1985). *See Florida v. Jimeno,* 500 U.S. 248, 254 (1991) (recognizing rule); *United States v. Jacobsen,* 466 U.S. 109, 129 (1984) (recognizing rule).



*A fortiori,* there can be no "worthier home" rule, either.

### C. The common law view that property should not be broken without great justification

In *Wilson v. Arkansas,* 514 U.S. 927 (1995), this Court held that the knock-and-announce requirement of the common law was a part of the Fourth Amendment. The Court relied on and quoted *Semayne's Case,* 5 Co.Rep. 91a, 91b, 77 Eng.Rep. 194, 195-96 (K.B.1603), which, in turn, relied upon a statute from 1275 which was part of the common law:

> But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors . . . , for the law without a default in the owner abhors the destruction or breaking of any house (which is for the habitation and safety of man) by which great damage and inconvenience might ensue to the party, when no default is in him; for perhaps he did not know of the process, of which, if he had notice, it is to be presumed that he would obey it.

*Id.* at 931.

As for searches of the premises, MATTHEW HALE, PLEAS OF THE CROWN 116-17 (1687; 1st American edition, 1847), requires "strong necessity and notice," and he also wrote about entries into the premises of third parties to search for wanted persons:

> If a justice of the peace issues a warrant to appre-

hend a felon, who is in his own house, and after notice of the warrant and request to open the door it is refused or neglected to be done, the officer may break open the door to take him [20] and the same law is, if it be but for suspicion of felony. 13 *E.* 4. 9. a. 5 *Co. Rep.* 91. *b. Semain's* case.(*)

> [20] But only upon strong necessity and after notice. *Curtis'* case, *Foster,* 135; 2 *Hawk. ch.* 14, 1; *Lannock v. Brown,* 2 *B. & Ald.* 592. See *Burdett v. Abbott,* 14 *East.* 163; *State v. Smith,* 1 *N. Hamp.* 346; *Bell v. Clap,* 10 *Johnson,* 263; *State v. Shaw,* 1 *Root,* 134; *Kelsey v. Wright,* 1 *Root,* 83.
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> (*) *Part* I, *p.* 572.

And so much more may he break open the house of another person to take him, for so the sheriff may do upon a civil process. 5 *Co. Rep.* 93. *a. Semain's* case. But then he must at his peril see that the felon be there, for if the felon be not there, he is a trespasser to the stranger whose house it is; but in both cases the officer must first notify his business that he comes about, and demand admission. *Ibidem.* . . .

> If a warrant of the peace issue from a justice of the peace, the officer or minister of such warrant may break open a door in case of a refusal to open after demand of notice of his business ruled by *Popham* and *Clerk,* 3 *Jac. Dalt. cap.* 78, *p.* 204, 205.

Similarly, 2 WILLIAM HAWKINS, A TREATISE ON PLEAS OF THE CROWN ch. 14, § 1, at 86-87 (1721), stated the rule as "no one can justify the breaking open of another's Doors to make an Arrest, unless he first signify to those in the House the Cause of his coming, and requests them to give him Admittance."



Last Term, the Court further explained in *Richards v. Wisconsin,* 117 S.Ct. 1416, 1421 n. 5 (1997), that

> the individual interests implicated by an unannounced, forcible entry should not be unduly minimized. As we observed in *Wilson v. Arkansas,* 514 U.S. 927, 930-932, 115 S.Ct. 1914, — - —, 131 L.Ed.2d 976 (1995), the common law recognized that individuals should have an opportunity to themselves comply with the law and to avoid the destruction of property occasioned by a forcible entry. These interests are not inconsequential.

### D. Greater intrusion equals greater justification in other areas of the Fourth Amendment

The greater the intrusion under the totality of the circumstances, the greater the justification required by the Fourth Amendment. Government necessity, while important, does not equal absolute power over citizens.

In the area of stop and frisk under *Terry v. Ohio,* 392 U.S. 1, 26 (1968), the justification for the limited pat down is looking only for weapons. This need to look for weapons was balanced with the fact that the pat down was less intrusive than a full search.

In "hot pursuit," *Dorman v. United States,* 140 U.S. App.D.C. 313, 475 F.2d 385, 394-95 (1970), the District of Columbia Circuit adopted the rule in unconsented warrantless entries that the greater the intrusion, the greater the justification that is required for it. The peacefulness of the entry also was a factor in a finding of reasonableness for the entry based on exigent circumstances. In any event, a grave crime was required. The *Dorman* formulation was relied upon in *Payton,* 445 U.S. at 587, and other cases.

The nature of the intrusion, coupled with the government's showing and need for it, sometimes leads to the result that the intrusion is unreasonable.

For example, in *Welsh v. Wisconsin, supra,* 466 U.S. 740, this Court held that the nature of the offense there (suspected DWI) did not justify a warrantless entry to arrest, even though evidence of the crime, the suspected drivers' blood alcohol level, would dissipate immediately and prompt action would be required to get necessary evidence.

Similarly, the Court held in *Schmerber v. California,* 384 U.S. 757 (1966), that for the government to pierce the skin, draw blood, and subject it to analytical and scientific testing, it must show that there is a clear indication that evidence will be found. "The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained"; a clear indication it would be found was required. *Id.* at 769-70.

After *Welsh,* the Court held in *Winston v. Lee,* 470 U.S. 753, 765-66 (1985), that a search for a bullet in a suspect's body by surgery under general anesthetic was unreasonable because of the serious nature of the invasion, considering the alternatives available to the government. The crime was serious, but so was the surgery. Ultimately, the government could prove its case another way. Thus, that search was unreasonable.

Here, the court below was correct in requiring a greater justification for imposing a gun into the premises. The officers had an obvious alternative: They did not need to make a forcible entry in the middle of the night. They could have waited Shelby out or tricked him to get him to come out. In either regard, he would not have been hidden in somebody else's house. Of course, he was not in the



house anyway because the government's surveillance was weak at best that the person they believed was inside was Shelby.

### E. *Richards'* comment about reasonable suspicion alone being enough to justify dispensing with announcement is dicta and cites no binding authority

In *Richards v. Wisconsin, supra,* at 1421-22, this Court stated in what is virtually dicta that,

> to justify a "no-knock" entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence. This standard—as opposed to a probable cause requirement—strikes the appropriate balance between the legitimate law enforcement concerns at issue in the execution of search warrants and the individual privacy interests affected by no-knock entries. Cf. *Maryland v. Buie,* 494 U.S. 325, 337, 110 S.Ct. 1093, 1099-1100, 108 L.Ed.2d 276 (1990) (allowing a protective sweep of a house during an arrest where the officers have "a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene"); *Terry v. Ohio,* 392 U.S. 1, 30, 88 S.Ct. 1868, 1884-85, 20 L.Ed.2d 889 (1968) (requiring a reasonable and articulable suspicion of danger to justify a pat-down search). This showing is not high, but the police should be required to make it whenever the reasonableness of a no-knock entry is challenged.

We submit that the constitutional foundation for this statement is lacking. The authorities for it are cited with a mere "Cf." for "compare." The reasonable suspicion standard as governing the nature of a violent entry of a home appeared full blossom from cases not in point, and these cases should not have been stretched to that extreme. While serious in themselves, a protective sweep *after* an entry[2] and a stop and frisk are, by definition, considerably less serious intrusions when compared to a "no-knock" entry which is truly a major event. As stated above, it is fraught with danger for everyone involved and is terrorizing for the citizens whose rights have been subordinated to the government's interest in entering under a warrant in the first place.

### F. The Ninth Circuit's rule requiring a greater need for a breaking is justified by prior cases of this Court

A higher standard than reasonable suspicion is required by the Fourth Amendment. For example, in *Camara v. Municipal Court,* 387 U.S. 523, 538-39 (1967), the Court held that administrative probable cause was required to constrain government discretion in entering the home; it is not probable cause in the criminal justice sense, but it is still probable cause. *Accord: Marshall v. Barlow's, Inc.,* 436 U.S. 307, 320-21 (1978); *Donovan v. Dewey,* 452

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[2] We concede that the point of a protective sweep is to protect against an attack on an officer. *Buie,* 494 U.S. at 333. Our point is that a sweep is a walk-through, likely even with a gun at the ready, but it does not involve battering rams and stun grenades wielded by 45-man SWAT teams.



U.S. 594, 599 (1981). Similarly, the Court has permitted warrants for entry into fire-damaged premises without a traditional showing of probable cause in the criminal sense, but it still requires some showing of cause to eliminate arbitrariness. *Michigan v. Clifford,* 464 U.S. 287, 294 (1984). The Court has also required prior authorization on less than criminal probable cause for roving patrols on interstate highways near the border. *Almeida-Sanchez v. United States,* 413 U.S. 266, 279-85 (1973).

All these cases involve a higher standard of probable cause than reasonable suspicion. The common law required a greater justification for entries involving breakings, and the Fourth Amendment has always been held to entitle the home to higher protection from governmental intrusion. Therefore, a higher level of justification for a breaking to conduct a "no-knock" entry is required.

## II.

## Breaking glass of an occupied house to make a forcible police entry in the middle of the night is not a *de minimus* intrusion, constitutional or otherwise.

### A. What law enforcement tells us about why they need to do it

The government and its *amici* argue that there is often great risk to officers from executing search warrants. To some extent this is true, but their position overstates both the risks and the numbers, and they do not mention the risks to citizens. It is a regrettable fact of life that people are going to die during "no-knock" raids; both police and citizens. The Fourth Amendment is designed to protect all "the people," not just the police.

As the government argues:

> To minimize those dangers, officers sometimes break a window to distract the occupants and thereby increase the officers' ability to gain quick control of the situation. By drawing the occupants' attention to the sound of breaking glass, officers may be able to divert the occupants into the less threatening positions, gain control of their movements, and reduce the risk of violence. Cf. *Michigan v. Summers,* 452 U.S. 692, 702-703 (1981) ("The risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation.").

Gov.Br. 21. A book has been written on the subject. CHARLES REMSBERG, THE TACTICAL EDGE: SURVIVING HIGH RISK PATROL (1986).[3]

While all concede there must be the ability for officers to assert control, it is not without legal or social limits.

## B. Reality of raids

### 1. Raids are intended to be quite violent and intimidating in the extreme, even when no one gets hurt

*Amicus* submits that reality must also be considered, and, if *amicus'* membership's experience is any guide, reality is more like *Larez v. City of Los Angeles,* 946 F.2d 630, 634-35 (9th Cir.1991), where the officers in a raid profanely threatened the citizens with violence, slammed them to the floor, and put guns in their face,[4] and *Rivera v. United States,* 728 F.Supp. 250, 255 (S.D.N.Y.1990), where the DEA was executing a search warrant for drugs on an informant's tip on three nearby apartments, officers beat down the doors with battering rams allegedly without warning, threatened the occupants at gunpoint, strip searched a woman, and found nothing. For obvious reasons, these types of cases do not end up on "COPS" for everyone to see.

Also, the government wants to give carte blanche to officers in this situation because it believes that the officer on the scene is the best judge of what should happen. Not always so. It is recognized that officers in these situations have their adrenaline pumping hard, and this creates high stress; they may more readily shoot accidentally or prematurely, their eyes may play tricks on them, their eye-hand coordination will suffer, and their judgment will be impaired. REMSBERG, *supra,* at 22-24.[5] Yet, this is where the

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[3] This subject is also discussed to a lesser extent in Donald B. Allegro, *Police Tactics, Drug Trafficking, and Gang Violence: Why the No-Knock Warrant Is An Idea Whose Time Has Come,* 64 NOTRE DAME L. REV. 552 (1989), relied on in *State v. Richards,* 201 Wis.2d 839, 850, 549 N.W.2d 218, 223 (1996), *rev'd,* 117 S.Ct. 1416 (1997).

[4] The reported cases are the tip of the iceberg. Virtually every criminal defense lawyer regularly hears clients tell of similar abuse at the hands of officers.

[5] *See, e.g., United States v. Slater,* 971 F.2d 626, 636 (10th Cir.1992); *Stroick v. Ponsetti,* 683 So.2d 1342, 1349 (La.App.4th Cir.1996); *Avila v. State,* 1997 Tex.App.Lexis 4782, *19-*20 (Aug. 28, 1997). In *State v. Albrecht,* 97 Md.

government notes that the Court has previously noted that they "are often forced to make split-second judgments . . . about the amount of force that is necessary in a particular situation." *Graham v. Connor,* 490 U.S. 386, 397 (1989), quoted in Gov.Br. 17.

It must be remembered that the raid is being conducted by "officer[s] engaged in the often competitive enterprise of ferreting out crime"; *Johnson v. United States,* 333 U.S. 10, 14 (1948); "acting under the excitement that attends the capture of persons accused of crime." *United States v. Lefkowitz,* 285 U.S. 452, 464 (1932). Also, citizens often respond with force not knowing who is coming in. *See, e.g., McDonald v. United States,* quoted *infra.*

The government's argument virtually "end runs" the prohibition against blanket exceptions to the rule of announcement forbidden in *Richards,* and it serves to elevate "no-knock" beyond judicial review contrary to *Ornelas v. United States,* 116 S.Ct. 1657 (1996).

### 2. Statistics of officer deaths

The *amici* states advise that the *Uniform Crime Reports, Law Enforcement Officers Killed and Assaulted*

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App. 630, 632 A.2d 163 (1993), *rev'd,* 336 Md. 475, 649 A.2d 336 (1994), a police officer was convicted in a nonjury trial of involuntary manslaughter and reckless endangerment for shooting an unarmed suspect in the chest with a shotgun. (He also frisked her before CPR could be performed.) The Maryland Court of Special Appeals reversed the conviction because the stress of the moment removed the gross negligence from the shooting, but the Maryland Court of Appeals reversed and affirmed the conviction.



("UCR") show high numbers of officer deaths in "drug-related matters." (The Wisconsin court in *Richards,* 201 Wis.2d at 853-55 nn. 8-10, 549 N.W.2d at 223-25 nn. 8-10, did the same thing.) For example, the 1994 UCR report showed that 53 of 708 officer deaths were drug related. The *amici* states admit that there is no way to tell how many are related to drug raids. Ohio Br. 10.

Agreed, the number of officers killed in drug raids is not readily apparent. The tables in the UCRs only indicate where to look. The tables only show the number of officers killed each year in "drug related matters," but they are overinclusive. The summaries of killings in each of the UCRs must be consulted for an accurate view.

The petitioner's brief in *Richards*, 1997 WL 65852, in its Appendix A, analyzed the 1981-94 UCRs, and it showed that the overwhelming majority of felonious deaths of police officers were unrelated to the execution of search warrants in drug cases. There is no significant statistical correlation between announcement or lack of announcement in a drug raid and the resulting deaths. Only 8 of 23 summaries even mention whether announcement occurred. The circumstances of some killings show that the officer was shot on entry, but the greatest threat to officers was from being shot by assailants hidden inside and not from being shot on entry. The summaries seldom tell whether announcement was an issue.[6]

## C. Risk to citizens

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[6] For what it is worth, an officer is substantially more likely to be shot during a traffic stop than in a drug raid. *Compare Maryland v. Wilson,* 117 S.Ct. 882, 885 (1997).

The government implicitly recognizes the risk to citizens by the "Cf." reference to *Summers;* Gov.Br. 21, *supra;* but it does not discuss it. *Amici* do not even mention the risk to citizens because their interest is upholding or supporting law enforcement. The UCRs, of course, do not have a table concerning deaths of citizens at the hands of police officers. To determine the number of citizen deaths requires painstaking review of case law, newspaper articles, and books.

The risk to citizens from any violent raid is no small matter. And, one of the points of having a knock-and-announce rule is that it gives the occupants and the police one last opportunity to determine whether they have the right place. *Ker v. California,* 374 U.S. 23, 57-58 (1963) (BRENNAN, J., concurring). It also gives the householder the opportunity to surrender his or her privacy to the processes of the law without force or violence. *Id.*

Armed and unarmed citizens are shot and killed by law enforcement officers executing warrants all the time. Sometimes the police search the wrong place. Oftentimes the citizen does not fully appreciate that law enforcement officers are breaking in and are not burglars.[7] To some

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[7] This was the factual issue tried in case pending before the Arkansas Supreme Court. *Green v. State,* CR97-59 (Ark. (submitted Oct. 16, 1997)). Green was convicted of murder in the shooting death of a law enforcement officer during a drug raid for a small amount of cocaine. Officers admitted at his trial that they knew going in that, one month earlier, Green had been one victim of a rash of home invasion robberies where the robbers at the door claimed to be police. Two weeks earlier, the police urged citizens in the newspaper to shoot anyone coming in who did not properly identify themselves. At trial, the officers said they announced; Green and his girlfriend testi-



extent, at least, it is apparent that the Fourth Amendment helps protect police from their own mistakes or overzealousness. A half century ago, Justice Jackson, concurring in *McDonald v. United States,* 335 U.S. 451, 460-61 (1948), noted the great risk of violence in unannounced police entries:

> I am the less reluctant to reach this conclusion because the method of enforcing the law exemplified by this search is one that is certain to involve the police in grave troubles if continued. That it did not do so on this occasion was due to luck more than to foresight. Many homeowners in this crime beset city doubtless are armed. When a woman sees a strange man, in plain clothes, prying up her bedroom window and climbing in, her natural impulse would be to shoot. A plea of justifiable homicide might result awkwardly for enforcement officers. But an officer seeing a gun being drawn on him might shoot first. Under circumstances of this case, I should not want the task of convincing a jury that it was not murder. I have no reluctance in condemning as unconstitutional a method of law enforcement so reckless and so fraught with danger and discredit to law enforcement agencies themselves.

Congress adopted a no-knock warrant procedure for drug cases in 1970. Comprehensive Drug Abuse, Prevention, and Control Act of 1970, § 509(b), Pub.L. No. 91-513, 84 Stat. 1236, 1274 (1970). (*See* H.R.Rep. No. 907, 91st Cong., 2d Sess. 202 (1970), reprinted in 1970

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fied they did not hear it.

U.S.C.C. & A.N. 4653-57 (stating the view opposed to adoption)). *See* Note, *Unannounced Entry to Search: The Law and the "No-Knock" Bill (S. 3246)*, 1970 WASH.U.L. Q. 205.

The horror stories of abuse of citizens under that "no-knock" regime, however, led to its repeal just four years later. Between 1970 and 1974, over 100 newspaper articles were published about "no-knock" horror stories. They were inserted into the Congressional Record to demonstrate the sordid abuses of no-knock warrant execution: While defending their homes, innocent householders shot and killed police officers and police officers shot and killed innocent householders, some of whom were doing virtually nothing and posing no threat to anyone. The Congressional Record references are cited in Note, *The Knock and Announce Rule: A New Approach to the Destruction of Evidence Exception*, 93 COLUM.L.REV. 685, 705 n. 133 (1993); JAMES BOVARD, LOST RIGHTS 234-39 (1994). Congress thus repealed it. Appropriations—Controlled Substances Act of 1974, Pub.L. No. 93-481, § 4, 88 Stat. 1455, 1456 (1974).

Even though the "no-knock" provision was repealed, "no-knock" entries and deaths still occur. We submit that the empirical evidence indicates that citizens are at least as likely to die as police during raids:

The wrong places are raided all the time. "It happens every day in this business." Joe Hallinan, "Drug Wars: Fervor Often Injures the Innocent," *New Orleans (LA) Times-Picayune* (Sept. 26, 1993) A20. For example, Rev. Accelyne Williams, a 75 year old black minister, was the subject of a mistaken drug raid. After breaking down his door, the police chased him through his house to his bedroom, handcuffed him, and this provoked a heart attack which killed him. The police obtained a "no-knock" war-



rant because their informant told them they could expect armed resistance. His widow settled with the Boston Police Department for $1,000,000. "Boston Police 'sorry' for fatal mistake," *Boston Glove* (March 27, 1994) 1994 WL 5358435; "Boston to Give Victim's Widow $1 Million in Wrongful Death Suit," *N.Y. Times Abstracts* (Apr. 25, 1996) 1996 WL 7503359; "Boston Settles Death Suit," *Nat'l L.J.* (May 6, 1996) A8.

Other examples of violent raids of the wrong place appear in: Andrew H. Malcolm, "Violent Drug Raids Against the Innocent Found Widespread," *N.Y. Times* (June 25, 1973) A1; "Fatal Shooting by Police Questioned in Drug Raid / Critics say they have too much power," *San Francisco Chronicle* (Nov. 2, 1992), 1992 WL 6287829 (killing of Don Scott in drug raid for nonexistent marijuana patch); "Anatomy of a Shooting / 8-year-old dies after gun battle during drug raid / Officer thinks he may have killed boy," *Atlanta Journal and Constitution* (Nov. 14, 1991), 1991 WL 7835413; "Apologies 'Don't Help' for Cops' Drug Raid Error," *San Francisco Chronicle* (Dec. 2, 1992), 1992 WL 6292803; "Federal Agents Raid Wrong Guthrie Home / Resident Tells of Forced Entry," *Saturday Oklahoman* (Dec. 21, 1991), 1991 WL 6139607. *See also* "The night they raided the wrong Janice," *Portland Oregonian* (Mar. 7, 1993), 1993 WL 6890184 (no shooting).

Shooting cases include: "Drug-raid shooting victim wins $225,000 settlement," *Denver Post* (April 6, 1996), 1996 WL 6689450 (no-knock raid led to shooting of occupant; the person wanted had already been arrested); "'No-knock' raid triggers anger / Couple claims they were innocent victims," *Evansville Courier* (Dec. 19, 1994), 1994 WL 9834885; "We were just a family watching TV," *St. Petersburg Times* (July 23, 1994), 1994 WL 4787388; "Lawsuit seeks $100,000 in damages," *Harrisburg Patriot*

(Mar. 13, 1992), 1992 WL 8738942 (warrant had expired); "Deadly Force / Policeman's Fatal Shot Will Haunt Him Forever / Officer in Lavoie Case Faces Probes, Trauma," *New Hampshire Week* (Oct. 8, 1989), 1989 WL 4831205 (*see also* "N.H. Judge Blasts Police Search, Throws Out Evidence in Drug Case," *Boston Globe* (July 31, 1990), 1990 WL 5831041); "Family Sues City Over Fatal Shooting / Officer Believed TV Control was Weapon," *Seattle Post-Intelligencer* (Nov. 7, 1995), 1995 WL 4328046 (*see also* "Seattle Police Cleared in Raid that Killed Man," *Seattle Times* (Nov. 16, 1995), 1995 WL 11223096 (jury found no liability)); "They Shot Daddy," *Isthmus* (Madison, WI) (June 30, 1995); "Fatal Shootout, Fire in Drug Raid / San Jose officer seriously injured in 1-hour gun battle," *San Francisco Chronicle* (Mar. 20, 1991), 1991 WL 4180041; "Lawyer Killed, Officer Hurt in Raid on Alleged Cocaine Ring," *Los Angeles Times* (Feb. 27, 1987), 1987 WL 2208330; "Suspect Killed, Officer Wounded in Shoot-Out," *Los Angeles Times* (Mar. 22, 1985), 1985 WL 2200366; "Excesses blamed in 'bad' raids," *San Diego Union-Tribune* (Dec. 13, 1992), 1992 WL 4766590 (raid on bogus informant tip led to shooting of innocent landowner).

**D. Common law view of forced entries**

By the Sixteenth Century, English searches and seizures had become a means of controlling and intimidating the populace.

Prior to about 1580, searches were limited to the lower classes and vagrants, so the rest of the population did not care or hear about it. WILLIAM J. CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING, 602-1791, 198 (doctoral dissertation, Claremont (Cal.)



College, 1990). By then, searches became increasingly intense and violent and more people had to endure them.

> Protestants, Catholics, yeoman, squires, noblemen, and Englishmen of every description encountered the kinds of searches that only vagrants and a few others had experienced previously. . . . [T]he new searches were being executed with unaccustomed intimidation, terror, and force. In fact, violent, general searches emerged gradually upon the English people after 1485, but in the 1580s and 1590s, they must have seemed to be exploding into the public consciousness from out of nowhere. That sensation was the foundation for the nascent right against unreasonable search and seizure.

*Id.* at 189-90.

One passage from CUDDIHY describing Sixteenth Century searches could describe searches and raids in the 1990s:

> "hot" ministers of the Protestants and emissaries of the Crown were often sent long on these expeditions to insure that they were conducted with sufficient thoroughness and violence. . . . The search itself was a quasi-military exercise, designed to intimate whoever experienced it. Each house was scouted before hand, spies positioned before every door and window, and guards set to prevent escape. Then the queen's men entered with swords drawn, crossbow bent, and pistols cocked, sparing not even the sick in their beds from intrusion.
>
> . . . Those who were the objects of such official attention, he observed elsewhere "carry their lives always in their hands," for a mere knock at the door

was enough to silence their dinner conversation, arrest their attention like deer at the sound of approaching hunters, and lead everyone present to commend himself to God.

*Id.* at 152-53.

It was against this background that *Semayne's Case* was decided just a few years later.

### E. There can be no *de minimus* breaking into the sanctity of the home; especially when it is with a semi-automatic rifle

#### 1. A breaking is a breaking

The government and its *amici* argue that breaking a window is not a significant occurrence. In one sense, it is not. What does a window cost? But that misses the entire constitutional argument. In a larger sense, it is highly significant because officers have broken past the "bound[s of] the unambiguous physical dimensions of an individual's home." *Payton,* 445 U.S. at 589-90 (bracketed material added). Just as "a search is a search" in the constitutional sense; *Arizona v. Hicks,* 480 U.S. 321, 325 (1987); a breaking is a breaking. *Karo v. United States,* 468 U.S. 705, 717 (1984) (monitoring a beeper once in the home requires a warrant; not "a minuscule intrusion on protected privacy interests").

#### 2. Breaking a window to enter is an act of violence, aggression, and intimidation against the occupants

The breaking of a window in the night is not a *de*



*minimus* act. Rather, it is an act of violence, aggression, and intimidation. It is designed to evoke terror in the occupants as a part of the government's assertion of control. People are scared to death when they think they are being burglarized at night.[8]

"We are at our most vulnerable when we are asleep because we cannot monitor our own safety or the security of our belongings." *Minnesota v. Olson,* 495 U.S. 91, 99 (1990). That is precisely why the law universally treats unlawful entry into an occupied dwelling as a violent crime that the homeowner may lawfully resist with deadly force. *See, e.g.,* MODEL PENAL CODE §§ 3.04(2)(b), 3.06(3)(d), 3.07(5) (Official Draft 1962; 1985 ed.) & *Commentary* at 91 (follows common law); RESTATEMENT (SECOND) TORTS § 79, Comment *b*, illustrations 1-2; Ark. Code Ann. § 5-2-620 (presumption force was lawful); Cal. Penal Code § 198.5 ("Homeowner's Bill of Rights"); 21 Okl.Stat.Ann. § 1289.25 ("May My Day" law; reasonable belief of occupant a defense). The homeowner literally can shoot first and ask questions later because he does not have to "await

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[8] *See, e.g., State v. Sutton,* 220 Neb. 128, 130-31, 368 N.W.2d 492, 494-95 (1985) (victim of burglary heard coins dropping on table; she went to investigate and encountered a burglar within two feet of her; she ran screaming from the house and suffered "fear [that] continued for several days after the robbery."); *Commonwealth v. Stepp,* 438 Pa. Super. 499, 504, 652 A.2d 922, 924 (1995) (a potentially violent encounter exists whenever a person discovers an intruder inside his home); *Sabri v. State Farm Fire & Casualty Co.,* 488 So.2d 362 (La.App.3d Cir. 1986) (father heard noise at door as key was working the lock; he came downstairs and shot his grown daughter as she came through the door; she was fleeing her home and her abusive husband and did not call ahead).

the glint of steel before he can act to protect his safety." *See People v. Benjamin,* 51 N.Y.2d 267, 271, 434 N.Y.S.2d 144, 147, 414 N.E.2d 645, 648 (1980).

In the context of a police search for a suspect in the home of a third person, however, different considerations must apply. A fugitive knows that he is a fugitive, and he is on the run. He certainly fears the knock at the door where an innocent householder does not because the fugitive may believe that it may be police. When the fugitive is in the home of a third person, however, the third person may not know that the guest is a fugitive, and this householder would have no expectation or fear that the police would be coming. Thus, the householder might more logically respond with force. This is why the Court requires a search warrant rather than an arrest warrant when the suspect is in the home of another. *Steagald v. United States,* 451 U.S. 204, 212 (1981); *Payton v. New York, supra.*

### 3. Aiming semi-automatic weapons in the house is not a minor entry

Aside from all the above, we add to the calculus here that an officer stuck a gun barrel ("gunporting") through the window. For what purpose does anyone aim a gun? To threaten, intimidate, and control, of course. (*See United States v. Latimer,* 415 F.2d 1365 (6th Cir.1969) (pointing semi-automatic pistol at FBI agent is an assault under 18 U.S.C. § 111).) It cannot be contended by anyone that aiming a loaded AR-15 assault rifle with a forty round clip at a person who is in his own house is not a serious constitutional event.

Consider an analogy: If a "stop and frisk" is not a "petty indignity," but is considered "a serious intrusion upon the sanctity of the person, which may inflict great



indignity and arouse strong resentment, and it is not to be undertaken lightly"; *Terry v. Ohio,* 392 U.S. 1, 17 (1968); then sticking a gun through a window in an apparent effort to either terrorize or deter those who see it or use it to shoot an occupant is hardly a *de minimus* occurrence either.

### 4. Throwing in stun grenades is not a minor entry either

The Government mentions that its rule would also permit officers to use "stun grenades" or "flash bang" devices, "which are designed precisely to reduce the threat of violence to officers, inhabitants, and the public," even though their use "often require[s] minor property damage such as the breaking of a window." Gov.Br. 22.

This is no minor occurrence either.

Filled with 1 to 3 ounces of flash powder, this hand grenade simulator explodes after a 1 to 1.5-second delay with a boom that may literally be deafening, a brilliant white-out of light that may cause at least temporary blindness, and a staggering concussion desired to jar and disorient anyone in its vicinity. (Some flash bang models emit a shrill whistle just before exploding to make the barricader look in their direction so he gets the full dazzling/dazing effect of the blast. Some also throw out rubber projectiles to sting anyone nearby.)

Used properly, the flash bang can forestall meaningful resistance and give you time to get through the fatal funnel and cover considerable ground inside safely. . . . But it can have drawbacks. For instance, smoke from one grenade can easily fill a 12 x 12-foot

room and will seriously hamper visibility. Fire-setting is a possibility.[9]

REMSBERG, *supra,* at 233-34. Yes, a window may be broken when this "destructive device"[10] comes into the property to be searched, but anything that is capable of burning down the house and, according to ATF, qualifies as a prohibited "destructive device" under the criminal law is hardly only going to inflict "minor property damage" as the government suggests.

## CONCLUSION

The holding below is founded on constitutional ground, and it should be affirmed.

Respectfully submitted,

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[9] They can also blow holes in walls. "'No-knock' raid triggers anger / Couple claim they were innocent victims," *Evansville Courier, supra.*

[10] A stun grenade is a "destructive device" under 18 U.S.C. § 921(a)(4). *United States v. Markley,* 567 F.2d 523, 526 (1st Cir.1977), *cert.denied,* 435 U.S. 951 (1978); *United States v. Ruiz,* 73 F.3d 949, 952-53 (9th Cir.1996) (it is a tactical weapon capable of destroying property by fire and incapacitating people, discombobulating them for up to a couple of days).